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In The
Supreme Court of the United States
October Term, 1998

GERLINDE KEYERLEBER,
Petitioner,

v.

CHAMPION INTERNATIONAL CORPORATION,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED

1. In reviewing a District Court's grant of an employer's Motion for Summary Judgment pursuant to Rule 56 in a fact-intensive employment discrimination and retaliation case, may a Federal Court of Appeals disregard the employee's evidence submitted in opposition to summary judgment which, if considered and reviewed, patently demonstrates the existence of genuine material issues of fact which preclude the grant of summary judgment?

2. Where a Court of Appeals affirms a District Court's grant of summary judgment and, in so doing, disregards the opposing party's evidence and substitutes its own judgment on the weight and credibility to be accorded to material facts, does the Court of Appeals violate the opposing party's right to trial by jury guaranteed in the Seventh Amendment to the United States Constitution?

3. In determining whether to grant a Petition for Writ of Certiorari, is there a need for the United States Supreme Court to exercise its supervisory authority over Federal Courts of Appeals, where those Courts of Appeals, throughout this nation, have become "certiorari" courts for poorer, weaker litigants, relegating their appeals to track-

two appellate justice, while reserving the traditional appellate mode primarily for appeals brought by wealthy, powerful or institutional litigants?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gerlinde Keyerleber respectfully prays that a Writ of Certiorari issue to review a final judgment and order of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Sixth Circuit was filed on February 17, 1999 and was not recommended for publication (Appendix A). The order of the Sixth Circuit denying Petitioner's Petition and Suggestion for Rehearing *En Banc* was filed on April 9, 1999 (Appendix B). The District Court's unpublished Memorandum of Opinion and Order granting Respondent's Motion for Summary Judgment was filed on June 16, 1997 (Appendix G).

JURISDICTION

This case was originally filed in the Court of Common Pleas, Cuyahoga County, Ohio, pursuant to Ohio law. (Apx. K,L,M) Respondent removed this action to Federal Court on the basis of diversity. Ohio generally looks to federal authorities interpreting Title VII discrimination and retaliation claims. Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n (1981), 66 Ohio St. 2d 192 and Little

Forest Med Ctr. v. Ohio CRC (1981), 61 Ohio St. 3d 607. The fact that this is a diversity case has no impact upon the fundamental issue herein, namely, whether the District Court and Court of Appeals so completely disregarded Petitioner's evidence in opposition to summary judgment as to violate Petitioner's right to trial by jury, identically guaranteed in both the Ohio and United States Constitutions.

The District Court granted Respondent's Motion for Summary Judgment. The Sixth Circuit affirmed. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment to the Federal Constitution, the Constitution of Ohio, Bill of Rights, Article VIII, Sections 7 and 8, along with pertinent federal and state statutes and rules, are reproduced in Appendices I-N.

STATEMENT OF THE CASE

Petitioner Gerlinde Keyerleber was employed with the DairyPak Division of Respondent Champion International Corporation from October 1, 1977 to June 9, 1995, almost 18 years. Champion is a manufacturer of

paper products. DairyPak is a division of Champion manufacturing sanitary cartons for food and consumable liquids. From 1987 through August 1994, Petitioner's three immediate supervisors were Messrs. Robert Ray, Andy Anderson and Barry Makofsky, in that order. Petitioner was the only female manager attached to the DairyPak corporate headquarters group. She was the only female manager whom Messrs Ray, Anderson and Makofsky ever directly supervised.

Mr. Ray, (Vice President, Manufacturing Services, DairyPak) became Petitioner's immediate supervisor in June, 1986. By 1988, Petitioner had become Safety Coordinator for the entire DairyPak Division of Respondent. Toward the latter part of 1988, Mr. Ray created a new position of Safety Manager to which he assigned Petitioner. At that time, Mr. Ray advised Petitioner that her becoming Safety Manager for the entire DairyPak Division was a promotion, that she would have more and greater responsibilities and that she would receive a significantly higher salary grade and salary. Mr. Ray specifically told her that her salary grade and salary would be comparable to her peers, Messrs. Beck and Fritsch. At that time, Mr. Beck (Manager of Production Engineering) and Mr. Fritsch

(Manager of Graphic Arts) both reported to Mr. Ray, as did Petitioner. Mr. Beck had a salary grade of 16 and an annual base salary of $58,000. Mr. Fritsch had a salary grade of 15 and a salary of $53,000. Petitioner (as Safety Coordinator) had a salary grade of 12 and an annual base salary of $36,000 (E31-32). Mr. Ray left Champion in August, 1989.

In October 1988, Petitioner assumed the newly created Safety Manager position. That position entailed substantially expanded responsibilities compared to Petitioner's former Safety Coordinator position (F8-16). The Safety Manager position was a managerial one with 20 indirect reports, as opposed to the non-managerial Safety Coordinator position with no reports. The expanded duties of the Safety Manager position included not only loss prevention, but also environmental oversight. The level of authority for Safety Manager was much higher and, in 1990, Petitioner's scope of responsibility was further increased from 6 to 7 plant facilities, with an addition of 280 workers, increasing by 28% the total number of employees for whom Petitioner was responsible (F19-20).

Notwithstanding the promotion, the greatly increased duties and the managerial-level responsibilities, Petitioner's

salary grade of 12 remained unchanged --- for the next seven years. Unlike every other male promoted to a managerial position, she received no promotional salary increase (E71). Unlike every other male manager who received substantial added responsibilities, she received no pay increase in recognition thereof (E69). The only change, according to Champion, was a change in the name of her title. According to Champion's "Safety Engineering Grid for Business Unit-Non-Managerial Positions", the salary grade of 13 was the lowest single "managerial" salary grade (E39; F20).

Mr. Andy Anderson, (Vice-President, Manufacturing Services), Petitioner's second supervisor, excluded Petitioner from business meetings which her position required her to attend solely and expressly because she was a woman. These meetings included plant managers whom Petitioner indirectly supervised. For example, in July 1992, he ordered Petitioner not to attend a particular business meeting which she was scheduled to attend. Toward the end of the meeting, Mr. Anderson stated: "this meeting went quite well...because there weren't any women involved." He openly expressed his view about women in management positions that "they didn't belong in

management, they belonged at home and that they didn't belong in a corporate structure." One witness testified that "the majority of remarks that I personally heard him (Anderson) make about women were in a derogatory manner." Shortly after Mr. Anderson became Petitioner's immediate supervisor, he greeted her by grabbing her from her front and kissing her on the cheek and lips. Petitioner testified that she found this form of greeting "sickening." Petitioner made it clear that she did not appreciate this form of greeting. When Petitioner complained to Mr. Makofsky (her supervisor) about Mr. Anderson's exclusion of her from business meetings because she was a female, Mr. Makofsky laughed with amusement indicating "that's how Andy is." Mr. Makofsky never spoke about the matter to Mr. Anderson, nor did he ever report this violation of Champion's Code of Business Conduct to the Corporate Compliance Meeting, as he was required to do (E22-28). The panel made no reference to the evidence of Mr. Makofsky's disparate treatment of Petitioner compared to other male employees.[1]

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[1] In oral argument, Judge Merritt made the shocking assertion that "Well, there's nothing in the record that she was excluded from any meetings because of her female

Moreover, at the very time when Petitioner was imploring Mr. Makofsky (as her supervisor) concerning her promotion, salary grade and salary, Mr. Makofsky openly stated his belief on more than one occasion that "women had no business in management in a company." Mr. Makofsky's actions were entirely consistent with his views (E20).

Even before he became Petitioner's immediate supervisor in approximately October 1989, Mr. Makofsky, contrary to Champion's Guidelines, **personally intervened with the Compensation Department and manipulated and altered key compensation documents** to insure that Petitioner's new position was not recognized as managerial, as expanded, as a promotion or as warranting a salary grade or salary increase (E44-55). **Mr. Makofsky understated to the Compensation Department the extent of Petitioner's new, expanded responsibilities. (In deposition, he testified that he didn't even know what they were)** (E35-38; F33-34). He also **altered and/or**

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status, counsel." Even though the contrary was specifically pointed out to Judge Merritt at the oral argument, directly quoting from the record, this fact remained unmentioned in the Opinion (D35-39).

fabricated compensation documents to reflect that the only change in Petitioner's status was the name of the title of her position.[2] (E44-55)

The appellate panel completely ignored the evidentiary record. It repeatedly referred to Petitioner's "limited responsibilities", (A2), "limited to generating 'monthly reports'" and "limited to assisting DairyPak management in establishing safety programs to comply with OSHA standards and RCRA ("Resource Conservation and Recovery Act" (A6).[3]

Ignoring the record, the panel also concluded that "there is no evidence showing that Makofsky influenced Moty's (the Compensation Analyst) determination (that the new Safety Manager position was neither a promotion nor warranted a salary grade increase no anything other than a change in title). (A4) **The panel made no mention of the**

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[2] These particular machinations on the part of Mr. Makofsky were done covertly with respect to Petitioner, who first became aware of them during discovery.

[3] The record clearly establishes Petitioner's new responsibilities to insure adherence to numerous environmental laws: RCRA, HMTA, SARA, SDWA, TSCA and CERCLA (E56).

falsified/altered compensation documents or the written memo of Ms. Moty to Mr. Makofsky that the salary grade determination was "agreed to" between the two of them (E42). The panel did not mention the testimony that Ms. Moty did not make independent judgments, but rather relied upon the judgment of supervisors more knowledgeable about the positions she was evaluating (E41-42; F29). The panel overlooked the fact that Ms. Moty never conferred with Mr. Ray, Petitioner's then supervisor, about Petitioner's job responsibilities in the new Safety Manager position which Mr. Ray himself had created --- as Champion's written (and practiced) policies and guidelines required her to do (F30-32).

The panel also ignored other evidence that Ms. Moty's salary grade evaluation was grossly defective, including the testimony of Champion's own compensation expert, who testified that the Safety Manager EPD (Exempt Position Description) was so vague that it would be difficult to do a full and accurate evaluation based upon it (F38). The panel failed to note the testimony of Mr. Charles Gerber, Director of Corporate Loss Prevention, who had more knowledge of the job responsibilities of Petitioner and those of mill loss prevention supervisors than any other

employee in the entire corporation (E57-58). Mr. Gerber testified that the Safety Manager position should have a salary grade of 14 or 15 and that Mr. Clem (VP Environmental Affairs) stated in the presence of him and Ms. Moty that the Safety Manager position, in Mr. Clem's view, was comparable to a salary grade 17 (E93-94). Mr. Gerber noted that in Ms. Moty's evaluation, she used no internal management positions as comparators and that the external job comparators she used bore no relation to the Safety Manager position which she evaluated (E57-59). None of this evidence in the record was mentioned by the panel. The panel failed to note that numerous witnesses, including Ms. Moty herself, viewed the Safety Manager position as a "managerial" position;[4](E61-68) additionally, the panel also failed to note the evidence that the lowest managerial salary grade in the business unit, according to Champion's written Compensation Grid, was 13 (E39; F20).

The evidence in the record showed that Petitioner's ascension to the Safety Manager position was a promotion (and that Petitioner was the only manager/supervisor in the

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[4] With the exception of Mr. Makofsky who, as indicated, believed that "women had no business in management in a company."

entire corporation who did not receive a promotional salary increase). The panel not only overlooked this evidence, but failed to note that even Respondent's counsel stated in a letter to its compensation expert that Petitioner was "promoted" to the Safety Manager position. In fact, Champion's expert also so concluded (E68). The panel disregarded the evidence of Champion's own guideline that for there to be a "promotion", there must be a salary grade increase.

The panel misconstrued the evidence in the record demonstrating that Petitioner was "similarly situated" to other managers. The panel focused on the job content of the comparative positions, disregarding the evidence that Petitioner's claims, at least in part, were based upon her identical "managerial" status to other "managers" with respect to her right to training (like other male managers), her right to a managerial salary grade (like other male managers), her right to a promotional increase upon becoming a manager (like other male managers) and her right as a manager to a salary increase for added job responsibilities (also like other male managers). These policies and practices were applied to all "managers," irrespective of specific duties.

The evidence that the job content of her position was not exactly the same as an environmental or loss prevention supervisor in a papermill (although similar in many respects) was merely indicative and supportive of the overall proof that her salary grade was inappropriately below even a managerial level. The panel turned these job content differences into a justification for affirming the District Court's grant of summary judgment. In doing so, the panel failed to appreciate (or even mention) the context of Petitioner's "similarly situated" evidence (F46-55).

Mr. Makofsky authorized substantial promotional salary increases within salary ranges for a single grade for added job responsibilities for male managers, even where those added responsibilities were obviously smaller than the many substantial additions to Petitioner's responsibilities. Yet, over a period of five years, Mr. Makofsky never authorized or even recommended a single promotional raise for Petitioner. This discrimination took place in the context of the above-average performance ratings he gave Petitioner (which automatically entitled her, along with all employees, to fixed, matrix-mandated incremental annual salary increases). However, most of those male managers to whom he accorded raises had lower performance ratings

than Petitioner. For one male manager, Mr. Makofsky unilaterally raised his salary grade (without any consultation or evaluation from the Compensation Department) because of some additional environmental responsibilities added to his job (E42-43); however, he neither ordered nor recommended a salary grade or salary increase for Petitioner, either when she received vastly increased environmental responsibilities or when an entire new plant was added to her jurisdiction (F19-20; E32). Male managers with loss prevention oversight responsibilities for multiple facilities were salary-graded and paid on a similar basis to loss prevention managers/supervisors at individual paper mills --- because of their multi-facility responsibilities (F53-54). This consideration was expressly stated in various compensation evaluations for male managers. Yet, Petitioner, who also had multi-facility responsibilities, on a divisional/regional basis, was neither graded nor paid on that basis. Petitioner's non-managerial salary grade of 12 as a multi-facility Safety Manager was 2 to 3 salary grades below paper mill loss prevention and/or environmental managers. The testimonies of Mr. Charles Gerber and Ms. Carolyn Merritt (Corporate Manager of Solid Waste) was to the effect that whatever distinctions could be made between

the duties of paper mill loss prevention or environmental managers, those distinctions were insufficiently significant, by any measure, to justify a 2 to 3 salary grade level differential based upon any rational business judgment (F52). None of this evidence was mentioned in the panel's Opinion.

The panel also failed to note the disparate, gender-discriminatory treatment of Petitioner by Makofsky with respect to mandatory management training. The evidence was overwhelming that Petitioner had a managerial position (although without a managerial salary or salary grade). Mr. Makofsky denied her attendance in the Champion-prescribed management training course which was expressly mandated for new managers; at the same time, he authorized this training for male managers, some of whom supervised nobody, either directly or indirectly (F55-66).

The panel misapplied the only authority cited in the entire Opinion, Ercegovich v. Goodyear Tire & Rubber Company, 154 F.3d 344 (6th Cir. 1998). The panel failed to appreciate that there was only one DairyPak Safety Manager position in the entire corporation. Thus, the job content of Petitioner's position was necessarily unique. In Ercegovich, the Sixth Circuit stated:

> "A *prima facie* standard that requires the plaintiff to demonstrate that he or she was similarly-situated in every aspect to an employee outside the protected class receiving more favorable treatment removes from the protective reach of the anti-discrimination laws employees occupying 'unique' positions, save in those rare cases where the plaintiff produces direct evidence of discrimination. As the plaintiff-appellant points out in his reply brief, if the non-protected employee to whom the plaintiff compares himself or herself must be identically situated to the plaintiff in every single aspect of their employment, a plaintiff whose job responsibilities are unique to his or her position will never successfully establish a *prima facie* case (absent direct evidence of discrimination)." 54 F.3d 334 at 353.

The panel concluded that "there is thus no basis for finding that the Plaintiff suffered retaliation or objectively intolerable working conditions because of her complaints to management" (A7). The panel reached this conclusion without the slightest reference to the facts in the evidence which support a strong inference of retaliation (F66-69), as follows:

On March 4, 1994, having had no response to her many entreaties for fair and equitable treatment, Petitioner

wrote a letter to her then supervisor, Mr. John Stuckey (Manager of Administration for DairyPak) specifically claiming that she believed she was a victim of gender discrimination. She also stated to the Champion EEO officer that she was considering legal action. This letter was submitted to Mr. Gidez (DairyPak Vice-President and General Manager), who discussed the letter with Messrs. Stuckey and Makofsky. The very next morning, Mr. Makofsky privately met with Petitioner in her office and stated to her, in reference to her letter: "I want you to know that there can be very serious consequences here for you." In May and June, 1994, Champion re-evaluated Petitioner's position based upon her accurate job duties as Safety Manager. Indeed, she had been performing these job duties as Safety Manager for the past five years. Her salary grade was raised to 13 and her job title was changed to "Loss Prevention Supervisor." However, Champion refused to recognize this as a promotion and she received no promotional increase, as did other male managers, despite her salary grade increase. Even though her raised salary grade expressly qualified her for a promotion according to Champion guidelines, (particularly because it was based upon a re-evaluation of the content of her job duties),

Champion disingenuously claimed that her increased salary grade was based upon external market data and not the content of her job (F61-66). Therefore, according to Champion, her new position title and salary grade increase did not qualify as a promotion. From June 1987 (when last promoted to the non-managerial position of Safety Coordinator) to June, 1995 (her separation from Champion), Champion never recognized Petitioner for a promotion or a promotional raise, either for added responsibilities or for an increased salary grade. No other male manager was treated in this fashion.

Coming immediately after Petitioner's written objection to gender discrimination, this adverse differential treatment was not only gender-discriminatory, but also retaliatory. Not long after the submission of her letter, her last supervisor, John Stuckey, brought up to Petitioner, **in connection with her letter**, the subject of Champion getting rid of her. Although Champion offered her the opportunity to relocate to headquarters in Stamford, Connecticut, upon the closing of its office (but not its plant) in Olmsted Falls, Ohio, Petitioner was justifiably fearful of relocating her family in light of the threat to get rid of her. **During this time, Petitioner's lawsuit was pending**. It

should be noted that all of the male multi-facility regional/divisional loss prevention and environmental managers were attached to a plant facility, not assigned to corporate headquarters. Petitioner was the only such manager (and the only female manager) refused the opportunity to remain in the "field" at a facility. Only Petitioner was required to relocate to headquarters in Stamford. Moreover, prior to Petitioner's written gender complaint, a decision had been made not to relocate Petitioner's position to headquarters in Stamford, and Mr. Makofsky had so advised Petitioner. After her letter and her lawsuit, that decision was reversed.

From the standpoint of pay, from October 1988 until her separation from Champion in June 1995, and notwithstanding her mandated high annual incremental percentage salary increases for her commendable performance, (available to all employees), Petitioner was consistently paid well below her recognized peers (Messrs. Fritsch and Beck and plant managers); Petitioner was paid well below every single loss prevention and environmental manager or supervisor in any paper mill or business unit in the entire corporation, well below any other multi-facility regional/divisional loss prevention or environmental

manager (all male) in the entire corporation, and even below those employees (all male) identified as her subordinates on the 1989 EPD for Safety Manager. Out of all of these above categories, Petitioner was the only loss prevention or environmental manager with a non-managerial salary grade of 12.

ARGUMENT

The question raised by this Petition is whether this Court of last resort will carefully read and consider the contents of this Petition and the Appendix references to the appellate briefs below. Or, will the summary dismissal of the Petitioner Gerlinde Keyerleber's case become final, without any judicial authority ever reading or considering, with reasonable care and attention, the facts and the record below which, by any fair measure, should preclude summary judgment in favor of Respondent?

Petitioner and her counsel took this case very seriously. During discovery, some 15,000 pages of documents were produced. There were over 20 witnesses deposed, on 38 different dates, held in several states. Respondent's counsel cross-examined Petitioner over 8 days comprising 45 hours of actual deposition time, requiring about 2500 transcript pages. The total number of deposition

transcript pages exceeded 8,000. Petitioner has incurred in litigation expenses, to date, about $100,000. Respondent's cost bill pending in the District Court for which taxation to Petitioner is sought is for an amount over $50,000. In short, this record is large and substantial, considering that it is a discrimination and retaliation claim on behalf of one individual employee.

The issue raised by this Petition is the right to trial by jury, guaranteed by both the Bill of Rights in the Ohio Constitution (Article VIII, Sections 7 and 8) and the Bill of Rights in the United States Constitution (Seventh Amendment). This is premised upon the obvious point that summary judgment, pursuant to F.R.C.P., Rule 56, is not a substitute for trial by jury, which was requested by Petitioner. If the evidence submitted by Petitioner raises genuine issues of material fact which, if believed, entitled her to the relief she sought, summary judgment should not have been granted or affirmed. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 91 L.Ed. 2d 202, 106 S. Ct. 2505 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed. 2d 265, 106 S.Ct. 2548 (1986); and Hunt v. Martin Cromartie, 143 L.Ed. 2d 731, 119 S.Ct. 1545 (1999). A violation of this basic principle is an abridgement of the right to trial by

jury. Moreover, a reading of the Opinion of the panel of the Court of Appeals fails to reveal what standard of review is being applied. Neither Anderson, Celotex, supra, F.R.C.P., Rule 56, nor any other authority was cited. (Hunt, supra, was decided in May, 1999, a few months after the Court of Appeals decision in this case).

One might initially ask: Why should the United States Supreme Court even bother to review an unpublished Opinion of a federal appellate court which affirmed a District Court's grant of summary judgment? It is primarily the function of appellate courts to review District Court grants of summary judgment and to affirm or reverse such grants based upon the evidentiary record. The cases selected for review by the United States Supreme Court should involve sweeping issues of constitutional scope and/or statutory and policy issues of national magnitude.

The answer is that this action, **by its very apparent unpublished insignificance**, demonstrates a terrible problem of national scope which goes to the very heart of the administration of justice and addresses nothing less than the right to trial by jury which ordinary citizens, without wealth, power or public notoriety, have a sacred right to enjoy. In employment discrimination cases, federal district

and appellate courts, on a rampant basis, have been dismissing without trial large numbers of employment actions --- not because they should be dismissed, but because federal courts, all too often, are substituting their own factual determinations involving weight and credibility which ought to be regarded as jury issues. Docket trimming should not take precedence over the preservation of constitutional rights.

The problem is discussed by William M. Richman and William L. Reynolds in "Elitism, Expediency and The New Certiorari: Requiem for the Learned Hand Tradition," (1996) 81 Cornell L. Rev. 273.[5]

Richman and Reynolds note that "an effective right to appeal error to the Circuit Courts no longer exists." (Id. at 275) They then quote Professor Thomas E. Baker who stated that "the ultimate question is whether this generation of judges is presiding over the demise of the federal

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[5] The problem has surfaced in the media as well, in the lead article by William Glaberson appearing on the front page of the Sunday Edition of the New York Times on March 14, 1999 entitled "Caseload Forcing Two-Level System for U.S. Appeals --- more one-word rulings --- tens of thousand of cases get limited review, according to judges and scholars."

appellate tradition." (Id. at 297). Richman and Reynolds conclude:

> "Finally, the courts have abandoned the notion of one appellate method for all cases and all litigants. The significant cases, those brought by wealthy, powerful, or institutional litigants - receive the traditional appellate mode. The routine, trivial cases - usually the ones brought by poorer, weaker litigants - are relegated to track-two appellate justice. For these cases (about half the total) the circuit courts have become certiorari courts, rather than the courts of mandatory appellate jurisdiction that Congress intended." (Id. at 341).[6]

The problem identified by Richman and Reynolds is manifestly present in this case.

Marshalling the facts for presentation in Petitioner's appellate brief was a daunting task. Employment cases are fact-intensive. Petitioner's counsel believed that it was necessary to move the court for additional brief pages. **These motions were properly presented and granted.**

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[6] Richman and Reynolds also note that Chief Justice Rehnquist, Justice Breyer and Justice Ginsburg have also addressed aspects of this concern. (Id. at 276, footnotes 7 and 8 and Id. at 317, footnote 210).

Both briefs, Opening and Reply, conform to the Rules of the Court.

During oral argument, the appellate panel was hostile and literally obsessed with the length of Petitioner's briefs (D7; D20).

Indicating a surprising lack of understanding of the facts of this case, one member of the panel stated:

> "And for 60 pages in your brief, and for 35 pages in your reply brief, counsel, you worked this case over but I still don't understand where the discrimination is." (D20)

The appellate panel was vitriolic toward Petitioner's counsel (D43-44).

It appears to us that the appellate judges on the panel were tired and overworked (D6). **Unfortunately, Petitioner was punished for having filed briefs which were properly accepted in conformity with the rules but just too long for the tolerance of the panel. The oral argument demonstrates that the judges were unfamiliar with the basic facts in the record. The Opinion demonstrates that our briefs were either never read or read in such a cursory fashion that no attention was paid to them. We have attached our briefs to this**

Petition in the fervent hope that someone will read them --- even if they are "strategically" too long. They were prepared with exhaustive attention to detail. The factual assertions therein are carefully documented to the record. We believe that if our evidentiary presentation is actually read and considered, it will be plain and clear that summary judgment should not have been either granted or affirmed. Won't somebody carefully read our briefs? Is that asking too much?

The oral argument pellucidly demonstrates the appellate court's lack of knowledge or comprehension of the facts in the record. The panel's Opinion reveals the same thing. A federal appellate court should be concerned and informed about the evidentiary record, not indifferent to it and hostile to counsel.

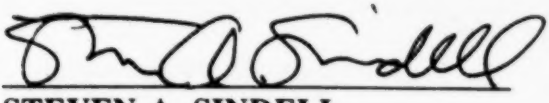
A simple remedy is the obvious one. This court should grant certiorari and, in the same penstroke, remand this case to the United States Court of Appeals for the Sixth Circuit to further consider this appeal in light of Hunt, Celotex, Anderson, supra, and Rule 56, without any extensive merits review and oral argument in this Court. Porat v. United States, 515 U.S. 1154, 115 S.Ct. 2604, 132 L.Ed. 2d 849 (1995).

This action also presents an opportunity for this Court to clarify, in employment cases, the proper evidentiary standard for review of a summary judgment motion (and an appeal from a summary judgment grant) by federal district and appellate courts. This Petition presents a good opportunity for this Court to exercise its supervisory authority over lower federal district and appellate courts.

CONCLUSION

This Petition evidences a miscarriage of justice and cries out for a remedy. For all of the reasons set forth hereinabove, the United States Supreme Court should grant this Petition, review this case and, at a minimum, remand to the United States Sixth Circuit Court of Appeals for further consideration. Alternatively, this Petition should be granted and this United States Supreme Court, upon merits review, should reverse the judgment of the United States Sixth Circuit Court of Appeals with instructions to remand this action to the District Court for trial.

Respectfully submitted,



STEVEN A. SINDELL
Counsel for Petitioner
Counsel of Record

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No. 97-3796

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FILED
FEB 17 1999

GERLINDE KEYERLEBER,	)
	) **ON APPEAL**
Plaintiff-Appellant	) **FROM THE**
	) **UNITED STATES**
v.	) **DISTRICT**
	) **COURT FOR**
CHAMPION INTERNATIONAL CORPORATION,	) **THE NORTHERN**
	) **DISTRICT OF**
	) **OHIO**
Defendant-Appellee	)
	)

BEFORE: MERRITT, NORRIS and GILMAN, Circuit Judges

MERRITT, Circuit Judge. Although this is a sex discrimination in employment case, it does not raise any federal question. It is a diversity action by the plaintiff against the defendant corporation under Ohio's fair employment practices statute, O.R.C. § 4112.02(A). The plaintiff claims that the defendant discriminated against her (1) by refusing to increase her "Salary Grade" and actual salary after she became "Safety Manager" in 1988, (2) by

denying management training opportunities and (3) by retaliating and constructively discharging her. We affirm the District Court's summary judgment. Plaintiff's salary was not out of line in light of her limited responsibilities, and her other complaints are completely without merit.

The defendant first hired the plaintiff in 1977 at its DairyPak plant in Olmstead Falls, Ohio, and promoted her in 1987 to the position of Safety Coordinator supervised by Robert Ray. The plaintiff's salary was set at Salary Grade Twelve. In March 1989, Ray completed a company pay form stating that plaintiff had received limited additional responsibilities, namely, assisting and directing management to comply with the requirements of the Occupational Safety and Health Act ("OSHA") and Resource Conservation and Recovery Act ("RCRA").

In April 1989, Martin Makofsky, the defendant's Director of Administration, requested a woman in the Compensation Department, Mikel Moty, to review the form prepared by Ray and determine whether a change in the plaintiff's Salary Grade was warranted. Makofsky became the plaintiff's direct supervisor later in 1989. Makofsky's request to Moty specifically said that plaintiff had received enhanced job responsibilities.

Moty determined that plaintiff's new environmental

and loss prevention responsibilities did not warrant an increase in salary. Moty based her conclusion on a survey of outside jobs in the same functional area and a comparison of company jobs of similar responsibilities. Moty denies that Makofsky influenced her recommendation in any way. Subsequently, the plaintiff continued to receive annual increments in her actual salary, though she did not receive any increased salary grade at that time.

In early 1994, the plaintiff sent John Stuckey, her new supervisor, a letter complaining of "unfair and discriminating conditions." In July 1994, her title was changed to "Loss Prevention Manager," and her salary grade was increased from Twelve to Thirteen. She did not, however, receive a salary increase except for the usual annual salary increase.

In August 1994, the plaintiff learned that her position would be moved from the Olmstead Falls office to the defendant's main corporate headquarters in Stamford, Connecticut. The plaintiff was terminated from her job in June 1995 because she declined to relocate. The plaintiff testified that a co-worker informed her that she was not wanted in Stamford and would be fired if she relocated there.

The plaintiff brought this action in late 1994. Her

primary direct evidence consisted of testimony about certain statements allegedly made by Makofsky, who was twice overheard saying that "women had no business in management in a company." Makofsky also failed to discipline another supervisor after he had made insensitive comments about women.

The plaintiff has failed to establish a causal connection between Makofsky's two isolated statements and any adverse employment action. There is no evidence showing that Makofsky influenced Moty's determination. Ray, not Makofsky, prepared the position description form. The plaintiff has failed to prove that her actual salary was out of line with her responsibilities between 1986 and 1995. She received annual salary increases during these years, and the record shows that she was mainly in the middle third of the salary range in comparison with others similarly situated. The plaintiff also complains that she did not receive a promotional increase after reaching Salary Grade Thirteen in 1994. The defendant's Salary Administration Guidelines, though, do not require a promotional salary increase in cases where a Salary Guide is increased following a reevaluation, as in the plaintiff's case. Similarly, the Guidelines did not mandate a promotional salary increase in 1988 when the plaintiff

became Safety Manager. Finally, the plaintiff argues that she should have been promoted to Salary Grade Thirteen well before 1994. The defendant's Salary Guidelines recommend review of Position Descriptions every three to five years. The defendant properly reviewed the plaintiff's position in the fifth year.

The District Court correctly concluded that the plaintiff was not similarly situated to the managers and supervisors receiving higher salaries and Salary Grades. In order to establish a prima facie case of discrimination through indirect evidence, the Sixth Circuit has held that a plaintiff must prove that she is similarly situated in "all of the relevant aspects" to the employees with whom she compares herself. *See Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (holding that an employee need not "demonstrate an exact correlation with the employee receiving more favorable treatment"). The plaintiff claims she was similarly situated to males in the position of "loss prevention supervisor" and "environmental supervisor" at the defendant's paper and pulp mills (which process timber into paper) and Plant Manager, Production Engineering Manager and Graphic Arts Development Manager at the defendant's seven DairyPak facilities (which produce materials from pre-

processed paper). She claims that she was similarly situated to these employees simply because of their positions within the corporate organization as managers.

The record demonstrates that the plaintiff's duties were limited to assisting DairyPak management in establishing safety programs to comply with OSHA standards and RCRA activities. The duties of the "loss prevention" and "environmental" supervisors were manufacturing duties. The duties of the loss prevention supervisor included organizing and coordinating an "overall loss prevention program for [the] Easter[n] Manufacturing Region" whereas the plaintiff's loss prevention responsibilities were limited to generating "monthly reports" and selecting and recommending safety equipment. Similarly, the responsibilities of the various DairyPak managers were different than the plaintiff's. The Plant Manager was responsible for supervising many of the overall daily plant operations, whereas the plaintiff only directed and assisted management in complying with OSHA and RCRA requirements.

The production engineering manager coordinated production improvements, and the graphic arts development manager specialized in improving printing techniques for use on DairyPak's products. None of these

managers' responsibilities were similar to the plaintiff's.

The plaintiff's retaliation and constructive discharge claims are also without merit. The plaintiff offers only a conclusory argument that her transfer to Stamford was punitive. The record shows that other employees were also transferred. The job of plaintiff's male replacement was located in Stamford, and the alleged comment that the plaintiff "was not wanted in Stamford" was without any factual basis in the record. Finally, the plaintiff offers no authority for her argument that a job transfer with no decrease in pay, benefits or duties is sufficient to state a claim for retaliation or constructive discharge. There is thus no basis for finding that the plaintiff suffered retaliation or objectively intolerable working conditions because of her complaints to management.

For all of the foregoing reasons, the Court upholds the District Court's judgment for the defendant.

97-3796

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIERCUIT

GERLINDE KEYERLEBER,	)	**FILED** APR 09 1999
	)	
Plaintiff-Appellant	)	
	)	
v.	)	
	)	**ORDER**
CHAMPION INTERNATIONAL CORPORATION,	)	
	)	
	)	
Defendant-Appellee	)	
	)	

BEFORE: MERRITT, NORRIS and GILMAN, Circuit Judges

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission

and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

CASE NO. 97-3796

In the
United States Court of Appeals
For The Sixth Circuit

GERLINDE KEYERLEBER,
Plaintiff-Appellant,

FILED
MAR 3, 1999

v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO AT CLEVELAND

PETITION AND SUGGESTION FOR REHEARING *EN BANC* with Appendix

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REQUIRED STATEMENT FOR REHEARING *EN BANC*

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the United States Court of Appeals for the Sixth Circuit [or the Supreme Court of the United States] and the consideration by the full Court is necessary to secure and maintain uniformity of decisions: Burlington Industries, Inc. v. Ellerth (1998), 141 L. Ed. 2d 633; Faragher v. City of Boca Raton (1998), 141 L. Ed. 2d 662; Ercegovich v. Goodyear Tire & Rubber Company, 154 F.3d 344 (6th Cir., 1998); Robinson v. Runyon, 149 F.3d 507 (6th Cir., 1998); Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir., 1992); and Kolstad v. American Dental Association, 912 F. Supp. 13 (U.S.D.C. for the Dist. of Columbia, 1996), 139 F.3d 958 (D.C. Cir., 1998), the latter argued this date in the United States Supreme Court, including the issue of the application of Faragher and Burlington to sex discrimination claims. IN THESE CASES, THE U.S. SUPREME COURT IS SENDING A CLEAR MESSAGE THAT THE DISCRIMINATORY MISCONDUCT EVIDENCED IN THIS RECORD IS ACTIONABLE.

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether this action should be remanded to the District Court for re-examination in light of Burlington, Faragher and (potentially) Kolstad, supra, decisions of the United States Supreme Court post-dating the filing of briefs in this appeal;
2. Whether the Mitchell test for "similarly situated" should apply to promotion, salary and salary grade gender discrimination claims for a uniquely situated manager in the absence of any performance or disciplinary issues, in light of Ercegovich, supra;
3. In reviewing a District Court's grant of summary judgment, whether a Federal Court of Appeals panel, consistent with Robinson, supra, is obligated to fairly consider the primary factual and legal contentions of the non-prevailing Appellant in rendering its

Opinion; and to do otherwise denies Appellant her constitutional right to trial by jury.

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Counsel for Appellant

INTRODUCTION, PURPOSE OF PETITION AND GROUNDS FOR REHEARING

Subsequent to the filing of briefs in this appeal, the United States Supreme Court decided Burlington and Faragher, supra, and this court decided Ercegovich and Robinson, supra. Prior to oral argument, Appellant notified the court of these decisions. It does not appear that the panel took them into account. We also urge that the panel failed to consider or credit material facts which ought to preclude summary judgment.

FACTUAL AND LEGAL ARGUMENT

In Burlington, supra, the United States Supreme Court held:

> "An employer is subject to vicarious liability to a

> victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c)." 141 L. Ed. 2d at 655. (Emphasis added)

In 1988, Appellant was promoted to Safety Manager in the DairyPak Division of Appellee Champion. (She had been a Champion employee for 11 years). Appellant's "work environment" included the following:

1. She was excluded from managers' business meetings by Mr. Anderson, the Vice-President of Manufacturing, because she was a woman. Mr. Anderson openly expressed the view in one meeting that women are "only good on their back and they belong either in the kitchen or the bedroom." (Appellant's Br., pgs. 10-11; J.A. 1977-1979). In another such meeting (prior to which he specifically asked Appellant not to attend), he stated at the conclusion of

the meeting: "this meeting went quite well...because there weren't any women involved" (Id., at pg. 11; J.A. 1284-1285). Mr. Anderson openly stated at work that women "didn't belong in management, they belonged at home and that they didn't belong in a corporate structure" (Id., at pg. 11; J.A. 1980). These exclusions from meetings were frequent (J.A. 671-672). Mr. Anderson, as Appellant's immediate supervisor, greeted Appellant (and other women) by grabbing her from her front and kissing her on the cheeks and lips (Id., at pg. 9; J.A. 1664, 1834, 1973 and 2366). Mr. Anderson specifically stated in Appellant's presence that "women belong in the kitchen and that women should have a set of knitting needles" "like (his) wife" (Id. at pg. 11, J.A. 1836-1838).

2. From September/October 1989 to August 1993 (Id. at pg. 10; J.A. 676), Mr. Makofsky was Appellant's immediate supervisor. Appellant, specifically complained and objected to Mr. Makofsky, her then immediate supervisor, as provided in the Champion Code of Business Conduct. (J.A. 684). Not only did Mr. Makofsky fail to take any action whatsoever, including so much as speaking to Mr. Anderson, he actually laughed with amusement telling Appellant "that's how Andy is" (Id. at pg. 12, J.A. 1205-1207 and 1661).

3. Mr. Makofsky, Appellant's immediate supervisor, on two occasions, openly stated his belief (AT THE VERY TIMES Appellant was complaining to him about salary and pay grade discrimination as Safety Manager) that "women had no business in management in a company" (Id., at pg. 7; J.A. 2358-2360). Mr. Makofsky didn't even regard Appellant as a "manager." However, multiple witnesses testified that she was a "manager" (Id., at pg. 32-35). Appellant was the only female manager he ever directly supervised (Id., at pg. 7). The essential requirements of Appellant's job description included "management and administrative skills" (J.A. 704). She indirectly supervised 20 employees (J.A. 699). Plaintiff had direct responsibility for the implementation of all of the safety, loss prevention and environmental programs for the entire DairyPak Division for the manufacturing operations of seven plants, covering over 1200 employees producing $300 million dollars in gross sales. According to Champion's policy, it was mandatory for all newly appointed managers to attend three Management Development Core Programs (J.A. 520). Mr. Makofsky, who was in charge of selecting eligible attendees, approved attendance of several males, one of whom supervised

NOBODY, either directly or indirectly (Reply Br. pg. 28; J.A. 1963). Yet, Mr. Makofsky refused to authorize Appellant to attend these important mandatory trainings (Id., at pgs. 26-29).

On the subject of gender discrimination evidence, the entire discussion in the court's opinion was:

> "HER PRIMARY DIRECT EVIDENCE CONSISTED OF TESTIMONY ABOUT CERTAIN STATEMENTS ALLEGEDLY MADE BY MAKOFSKY, WHO WAS TWICE OVERHEARD SAYING THAT 'WOMEN HAD NO BUSINESS IN MANAGEMENT IN A COMPANY.' MAKOFKSY ALSO FAILED TO DISCIPLINE ANOTHER SUPERVISOR AFTER HE HAD MADE INSENSITIVE COMMENTS ABOUT WOMEN." (Opinion, pg. 3) (Emphasis added)

We submit that Appellant's frequent exclusions from business meetings due to her gender, numerous utterances of extreme gender bias by upper managers controlling Appellant's work environment, inappropriate kissing,

exclusion from mandatory managerial training to which she was entitled (which other eligible males were accorded) and refusal of her immediate supervisor to recognize her managerial status because of his gender-hostile views --- all provide sufficient evidence for jury submission on the issue of "severe OR pervasive" hostile work environment. AND, SURELY, SUCH FACTS PROVIDE AMPLE EVIDENCE OF GENDER BIAS AGAINST APPELLANT, AS A FEMALE MANAGER.

The panel concluded, as a matter of law, that:

> "The plaintiff has failed to establish a causal connection between Makofsky's two isolated statements and any adverse employment action. There is no evidence showing that Makofsky influenced Moty's determination." (Opinion, pg. 3)

Appellant's salary was materially impacted by her salary grade. This, in turn, depended upon whether she received a promotion from her previous position when, in 1988, she went from Safety Coordinator to Safety Manager. As "nonmanagerial" Safety Coordinator, she had a salary

grade 12. Champion fabricated a document purporting to indicate that when Appellant was assigned to the newly created Safety Manager position, this represented only a change in title, not a promotion. Champion's Compensation Analyst, Ms. Moty, evaluated the Safety Manager's position also as a salary grade 12. She did this in May, 1989 at the request of Mr. Makofsky. From 1988 to 1994, Appellant remained at a salary grade 12. She did receive annual salary increases per a percentage matrix premised upon her good performance. She never received a promotional raise --- as did other male managers and supervisors --- based upon her greatly increased job responsibilities. The panel assumed that Appellant had "limited additional responsibilities" based upon a single document, her Exempt Position Description (Id., at pg. 2). The panel disregarded the substantial evidence in the record of Appellant's greatly increased responsibilities as Safety Manager, (Reply Br. Pg. 2-6 attached as Appendix Exh. A).

The panel failed to note that the Exempt Position Description used for the re-evaluation in 1994, FINALLY AND FOR THE FIRST TIME, set forth accurately the true scope of Appellant's responsibilities, WHICH SHE HAD

BEEN PERFORMING, YEARS EARLIER, AS SAFETY MANAGER, IN 1988 AND 1989 (J.A. 307-310; Reply Br. Pgs. 2-6; attached Appendix Exh. A). A MAJOR FACTUAL ASPECT OF THIS ENTIRE CASE IS MR. MAKOFSKY'S GENDER-MOTIVATED, INTENTIONAL REFUSAL TO EVEN COMMUNICATE THE TRUE SCOPE OF APPELLANT'S DUTIES TO THE COMPENSATION DEPARTMENT SO THAT THE APPELLANT'S SAFETY MANAGER POSITION COULD HAVE BEEN PROPERLY EVALUATED IN 1988 AND 1989 AS THE PROMOTION TO A MANAGERIAL POSITION WHICH IT WAS.

The important principle at stake here is THE OBLIGATION OF A FEDERAL COURT OF APPEALS TO READ THE BRIEFS AND EXAMINE AND CONSIDER THE EVIDENCE IN THE RECORD IN A FAIR AND DISPASSIONATE MANNER. IF THE RECORD PRESENTS MATERIAL ISSUES OF FACT, SUMMARY JUDGMENT IS INAPPROPRIATE. The panel's opinion doesn't even so much as acknowledge the actual primary factual and legal claims of Appellant and thoughtfully explain in some way why those claims are inadequate. Are we not entitled to at least that much consideration?

THERE IS CREDIBLE EVIDENCE IN THIS RECORD DEMONSTRATING THAT: (1) Appellant's move from Safety Coordinator to Safety Manager was a promotion, requiring a higher salary grade; (2) Appellant's Safety Manager position was a "managerial position" requiring, by Champion's own guidelines, a grade 13; (3) Mr. Makofsky not only influenced, but dictated the result of the 1989 evaluation of Ms. Moty; and (4) Mr. Makofsky discriminated against Appellant on the basis of her gender in failing to accord her a promotional increase in salary for her expanded job responsibilities --- which was accorded to male managers and supervisors throughout the corporation.

(1) APPELLANT WAS PROMOTED TO SAFETY MANAGER

In October 1988, Mr. Robert Ray was Appellant's immediate supervisor. He created the Safety Manager position and told Appellant that this was a promotion, that she would have more and greater responsibilities and that she would receive a higher grade and salary, commensurate with her peers, Messrs. Beck (salary grade 16) and Fritsch (salary grade 15). (J.A. 1734-1737, 1742-1744 and 1840-1841). Appellant's new position encompassed enormously increased

responsibilities. (Reply Br., pgs. 2-6, attached as Appendix Exh. A). Not only did Mr. Ray tell Appellant it was a "promotion," Champion's independent compensation expert, Ms. Bentson, testified it was a promotion and Champion's counsel advised her in writing that it was a promotion (J.A. 1025-1026 and 1217-1219). This is significant. Champion's Salary Guidelines indicate that a promotional salary increase "may be granted to an employee who is assigned to a new position with an approved higher salary grade" (J.A. 469).

The process begins with an Employee Action Form ("EAF"). This is a form submitted to Compensation prepared by the employee's immediate supervisor (Mr. Ray) and also signed by the next higher level (Mr. Bensing). In practice, these EAF's "were not changed...it went to Human Resources and then it was approved and returned to us generally as accepted or as recommended" (J.A. 2027-2030). One would have expected on Appellant's EAF (J.A. 559; Appendix Exh. B) the signatures of Messrs. Ray and Bensing, indicating a promotion as the "action taken." In fact, neither signed it. Instead it was signed by Mr. Makofsky, who ordinarily would not have done so since he was not Appellant's supervisor at the time. MOST CRITICALLY, THIS EAF IS A

FABRICATED, ALTERED DOCUMENT. We urge careful consideration of Appellant's Brief at pages 23-29. The Safety Manager Exempt Position Description ("EPD") is an admitted altered document. There can be no question but that Mr. Makofsky intervened at some point to derail or cover up what Mr. Ray's EAF should have indicated: an increased salary grade and promotion, exactly as he promised Appellant. In fact, contrary to Champion's Salary Guideline, this EAF never even went to Compensation. Champion offered no facts refuting our proof that these two critical documents were fabricated and/or altered.

(2) APPELLANT'S SAFETY MANAGER POSITION WAS "MANAGERIAL"

The record contains substantial evidence that Appellant had a "managerial position" as Safety Manager. She was responsible for safety in seven different facilities. The entire safety function of the DairyPak plants was under her jurisdiction. Mr. Gerber, Director of Corporate Loss Prevention, the highest loss prevention official at Champion, testified to the managerial status of her position (J.A. 1334). Mr. Ray considered the position he created to be "managerial" (J.A. 1840-1841). Ms. Merritt, Corporate EHS

Manager, likewise so testified (J.A. 2016-2018). Even Champion's compensation expert, likewise so testified (J.A. 1220-1221). The only person who believed that Appellant was not a "manager" was Mr. Makofsky, who also believed that women should not be managers in a corporation.

The obvious "managerial" status of Appellant is significant. Within the entire Business Unit (including DairyPak and a number of paper mills) in the field of Safety and Loss Prevention, the highest "nonmanagerial" positions were engineers (J.A. 933). Salary grade 12 was the highest "nonmanagerial" salary grade. Salary grade 13 was the lowest "managerial" position (J.A. 933; Appendix Exh. C). NOT A SINGLE, SOLITARY LOSS PREVENTION/SAFETY SUPERVISOR OR MANAGER IN THE ENTIRE COMPANY HAD A SALARY GRADE AS LOW AS 12. Mr. Gerber testified that Appellant's position should have been a salary grade 15 (J.A. 1373-1374), noting that Appellant had "responsibility for an entire operating division" (J.A. 1334).

(3) MR. MAKOFSKY DIRECTLY INFLUENCED MS. MOTY'S SALARYGRADE EVALUATION

We have already noted Mr. Makofsky's role in

intervening and covering up what should have been Mr. Ray's EAF. His intervention was contrary to Champion's Guidelines and Procedures, since he was not at the time Appellant's immediate supervisor. Also, while Mr. Ray was still Appellant's immediate supervisor, Mr. Makofsky dealt with Ms. Moty, directly, in connection with her evaluation.

There was testimony that Ms. Moty did not make independent judgments on salary grades (J.A. 1534). In fact, Ms. Moty acknowledged in writing that she and Mr. Makofsky "agreed" to the salary grade 12 (J.A. 908). Additionally, Ms. Moty acknowledged that the job duty information available to and used by her (essentially the EPD) was vague; Champion's compensation expert testified that the information was so vague that it would be difficult to do a full and accurate evaluation (J.A. 1212-1215). Ms. Moty never consulted with Mr. Ray, Appellant's immediate supervisor, who created the position. This was contrary to Champion's established policy (J.A. 468). Nobody ever consulted with Appellant. Mr. Makofsky gave Ms. Moty no additional information regarding Appellant's job responsibilities; Mr. Makofsky testified that he did not know whether or not her job responsibilities changed from Appellant's previous

nonmanagerial Safety Coordinator position once she assumed her new Safety Manager position (J.A. 1934). There was substantial testimony that Ms. Moty's evaluation was not even based upon a comparison of relevant external or internal positions. No comparison of Appellant's job duties were made with any loss prevention/safety managerial or supervisory positions. Ms. Moty testified that she could not tell if the Safety Manager position was "managerial," because she did not have enough information. She testified that she relied upon Mr. Makofsky, WHO NEVER INFORMED HER OF APPELLANT'S JOB DUTIES (J.A. 2092-2095). Mr. Makofsky claimed that he spoke with Ms. Moty in 1989 about Appellant's position after her May, 1989 position evaluation. Ms. Moty denies this (J.A. 1931-1934; 2179-2180). In other position evaluations, (for males), Champion specifically recognized the appropriateness of at least grade 13 for loss prevention supervisors with multi-facility responsibilities (J.A. 1094). The panel's conclusion that there was no evidence that Mr. Makofsky "influenced" Ms. Moty's evaluation flies in the face of the facts. Mr. Makofsky, completely contrary to both procedure and practice at Champion, intervened, fabricated and/or altered documents and failed to inform Ms. Moty of

Appellant's greatly expanded duties which unquestionably placed her in a managerial position. He made every effort to convince Ms. Moty that the altered EAF, reflecting a change in title only, was accurate and that the Safety Manager position was neither promotional, managerial, nor a significant expansion of her job responsibilities. He did this because he did not believe women should be managers in a corporation.

The opinion of Judge Karen Moore, joined by Judges Jones and Cole in Ercegovich, supra, makes it clear that discriminatorily motivated upper management influence in the decision making process is actionable.

With respect to the issue of similarly situated, the panel made an analysis completely contrary to the teaching of Ercegovich. Appellant had a unique position. She was not a clone. Ercegovich teaches that the relevant aspects must be used as comparators, not an irrelevant job duty content comparison. While there were many similarities between loss prevention/environmental supervisors and managers in paper mills and Appellant's position, this is not a case involving discipline for misconduct as in Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir., 1992). Appellant's managerial status in loss prevention/safety management and supervision with multi-

facility responsibilities are the relevant aspects to be compared. When that comparison is relevantly made, not a single employee promoted to a safety/loss prevention managerial position failed to receive a promotional raise, pursuant to Champion's Salary Guidelines. When the relevant status of a manager is compared to other managers, no new loss prevention/safety male Champion manager was ever denied management training; no loss prevention/safety manager at Champion with hugely expanded job responsibilities within a short period of time failed to receive a substantial promotional raise, even within the same salary grade. These are the relevant aspects impacting upon Appellant's pay, as Ercegovich holds should be considered. The panel improperly ignored Ercegovich and returned to the inapplicable Mitchell standard, eschewed in Ercegovich for this type of claim.

(4) MR. MAKOFSKY'S FAILURE TO ACCORD APPELLANT A PROMOTIONAL INCREASE FOR EXPANDED JOB RESPONSIBILITIES WAS GENDER-DISCRIMINATORY

There are numerous examples of immediate supervisors at Champion who accorded to their subordinates

substantial salary increases (within the same salary grade) when the job responsibilities were greatly expanded. Appellant's job expansion included not only those already inherent in her Safety Manager position, but also the addition of an entire new DairyPak manufacturing operation in Waynesville, North Carolina, adding hundreds of employees to Appellant's jurisdiction. Mr. Makofsky unilaterally raised the grade of Mr. Ellis (a plant engineer) from 13 to 14, for added duties of a few environmental responsibilities. Another safety engineer who had his responsibilities expanded by the addition of one more plant received a unilateral promotional increase of $5,000.

(5) RETALIATION

Appellant repeatedly complained for years to upper management both orally and, in 1994, in writing, about the gender discrimination directed against her. Immediately after she put it in writing, she was told by upper management that "THERE CAN BE VERY SERIOUS CONSEQUENCES HERE FOR YOU" (Reply Br., pg. 34; J.A. 1694-1695). Shortly thereafter, in connection with her letter, Appellant's then immediate supervisor, Mr. John Stuckey, BROUGHT UP TO HER THE SUBJECT OF GETTING RID OF HER (J.A.

1729-1730; 1894-1895 and 2379-2380). The panel observed:

> "The Plaintiff offers no authority for her argument that a job transfer with no decrease in pay, benefits or duties is sufficient to state a claim for retaliation or constructive discharge" (Opinion, pg. 5).

The panel offered no authority or explanation as to why any reasonable employee would relocate her entire family to another state under these threatening circumstances, irrespective of employment package.

CONCLUSION

At minimum, this case should be remanded to the District Court for reconsideration in light of Burlington and Faragher, supra, if not simply reversed and remanded for trial. These cases hold that IT IS UNNECESSARY TO DEMONSTRATE ADVERSE ACTION AGAINST THE EMPLOYEE. In such a circumstance, the employer has an affirmative defense focused on the notice it received of the alleged misconduct, the avenues available for employee redress, the extent to which the employee utilized those avenues and the remedial action taken, if any, by the employer.

There is no reason to conclude that Faragher and Burlington apply only to cases of sexual advances and

touching. Indeed, the United States Supreme Court this very day heard oral argument in Kolstad v. American Dental Association, 139 F.3d 958 (D.C. Cir., 1998). This attorney has been informed by *amicus* counsel in Kolstad, supra, that the application of Faragher and Burlington to sex discrimination cases was raised in briefs and oral argument before the United States Supreme Court. Perhaps this Court of Appeals should refrain from deciding this Motion until the United States Supreme Court decides Kolstad, a decision which may well determine the scope of Faragher and Burlington.

We also believe that the teaching of Robinson, supra, (per Judge Jones, with the concurrence of Judges Daugherty and Carr) emphasizes the importance of considering ALL evidentiary indicia of unlawful discriminatory animus. The panel failed to do this.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO - EASTERN DIVISION

GERLINDE KEYERLEBER,

Plaintiff,

-vs- CASE NO. 97-3796

CHAMPION INTERNATIONAL CORPORATION, ET AL.,

Defendants.

TRANSCRIPTION OF TAPE RECORDED ORAL ARGUMENTS BEFORE THE UNITED STATES COURT OF APPEALS, SIXTH CIRCUIT ON DECEMBER 17, 1998.

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MR. SINDELL: Thank you. Your Honors, I'd like to reserve some time for rebuttal, if I may.

JUDGE: All right.

MR. SINDELL: Miss Keyerleber, this involves an employee at Champion for 18 years. There is no issue in this case involving misconduct or performance issues.

Her position was pretty much undisputed that she was well above average as a performer basically throughout the time.

Nevertheless, our claim is pay discrimination and promotion discrimination.

In connection with that, according to Justice Scalia in the Hicks case a suspicion of incapacity, as he put it, involving alterated and deviant documents as well as discriminatory and retaliatory disrupt in termination.

And what are the gender issues in this case. I might say there is a wealth of evidence. There was a lot of discovery here.

First of all, the person you need to identify is Mr. Makofsky. From 1988, late in 1988 until 1993 approximately he was the immediate supervisor of Miss Keyerleber and he had an supervising authority in this situation with respect to her raises within her salary range and insinuated himself into her salary grade.

This is a gentleman with respect to whom there is gender bias evidence. First of all, during the relevant period, 1990, '91 when my client was asking for pay raises consistent with what she had been promised by the individual who created her job and told her she was getting a promotion and told her that she would be comparable to her peers who were making considerably more $15,000, $20,000 more. At that time her supervisor was Mr. Ray.

While she was asking about this, Mr. Makofsky was making statements that women had no business in management in a company. And not only did he say that but his actions were as good as his word. There is a correspondence here between what he said and the net effect of what he did.

Other evidence of gender discrimination include that the vice-president of manufacturing was a Mr. Anderson who for a brief period of time was Miss Keyerleber's immediate supervisor, as was Mr. Makofsky later, and he basically (inaudible) because she didn't like him kissing her when he greeted her. And he goes away but he remains vice-president of manufacturing and what he did was to exclude her from meetings which she absolutely had attended as safety manager
and was entitled to attend.

JUDGE MERRITT: What exactly were her duties as safety manager? What is she supposed to do?

MR. SINDELL: Well, Your Honor, as safety manager, we have outlined this in enormous detail, but basically what she did was provide for the safety from a manager and administrative standpoint for seven different facilities. These are DairyPak carton plants.

JUDGE MERRITT: What did she do?

MR. SINDELL: Specifically she would go to the various plants and make recommendations in terms of safety issues.

JUDGE MERRITT: Mainly making sure that they complied with OSHA.

MR. SINDELL: That's one of the things. She also had environmental responsibilities which were added to her duties which represented about 40 percent of what she was doing.

But in addition to that, to specifically answer your question --

JUDGE MERRITT: What kind of environmental, making sure that some state and federal EPA regulations were not breached, is that what that was?

MR. SINDELL: That type and also I believe there were several others involved. The RCRA, the Resource Conservation and Recovery Act.

JUDGE MERRITT: They were using chemicals in the process and that was the kind of thing?

MR. SINDELL: Yes, Your Honor.

JUDGE MERRITT: That's what I want to know.

MR. SINDELL: That's correct. It's actually on page four of my brief under item six.

JUDGE MERRITT: Your brief is so long, counsel. You know, we have a 50 page limit and this is much longer than that. I mean it's single spaced 60 pages practically.

And we have a limit on the reply brief. In fact I inquired at the clerk's office what's going on here and they said, well, they were just having trouble getting briefs filed and they finally capitulated. You finally wore them down.

MR. SINDELL: Well, I hope my verbosity will not detract from my argument.

JUDGE MERRITT: Well, there's just so much in there it's hard to read. This is our seventh case today and you see the size of this record and the others are similar.

So being concise and brief is, at least in this court, is something that strategically helps us.

MR. SINDELL: Well, I feel properly chastised and I hope it won't affect the result.

In terms of the job that my client did, she was responsible for accident reporting, for even FDA compliance, all kinds of injuries. She worked with agencies outside of the company dealing with safety and so forth, fire regulations, just a whole wealth of them that are outlined on pages three through six of my brief, very detailed.

JUDGE NORRIS: There are certain things she was held by because she was a woman.

MR. SINDELL: Absolutely.

JUDGE NORRIS: Now, she was replaced by a man, was she not?

MR. SINDELL: Yes, she was.

JUDGE NORRIS: Did he receive any greater salary than she did?

MR. SINDELL: Yes, he did, in this respect, Your Honor. She did not receive a promotional increase at any time during her entire period, Your Honor.

When Mr. Kummerfeldt came into her position after she left, he had a grade 11, he moved to her grade which was 13. But he not only received -- he was making $41,000 and I believe he went up to $52,000 or $53,000.

He not only received a ten percent relocation, which would be true for everybody, but I believe he received about $5,000 or $6,000 on top of that and over and above the minimum for that salary range which is part of our case.

JUDGE MERRITT: $5,000 or $6,000 for what?

MR. SINDELL: That's a good question.

JUDGE MERRITT: A one time payment?

MR. SINDELL: Yes. What they did was give --

JUDGE MERRITT: Was he getting the same salary that she was getting or did he get something different?

MR. SINDELL: He got more. He received actually more dollars.

JUDGE MERRITT: More salary?

MR. SINDELL: Yes.

JUDGE MERRITT: On an annual basis?

MR. SINDELL: Yes.

JUDGE MERRITT: Where is that in the record?

MR. SINDELL: I think you will find it -- I have it in my notes.

JUDGE MERRITT: I'm not talking about now, a one time payment or a relocation expense, I'm just talking about his regular salary.

You're saying that was more than what she was getting.

MR. SINDELL: Well, let's see. I have $52,000, $4,000, $48,000, her salary was close to that. I'm not sure. About the same maybe, if you count the relocation.

JUDGE MERRITT: So he didn't get a salary increase?

MR. SINDELL: If you count the relocation in, that would be different.

JUDGE MERRITT: Well, he did relocate?

MR. SINDELL: Yes.

JUDGE MERRITT: Is there any indication that she was asked to relocate?

MR. SINDELL: Yes, she was, Your Honor.

JUDGE MERRITT: And if she relocated is there any indication she wouldn't have gotten the same thing?

MR. SINDELL: No.

JUDGE MERRITT: So her replacement was a man and he didn't get anything more in the way of salary than she was making and he didn't get anything more in the way of relocation expense that she would have gotten.

MR. SINDELL: That's correct. That is correct. However, I would point out to you with respect to Mr. Kummerfeldt that what he did get was more than he had to get because my client, and this is an important point here, every manager upon becoming the manager, as Mr.

Kummerfeldt did, received a boost in salary over and above the minimum for the new grade position.

My client didn't get that ever for eight years. Every other manager, including Mr. Kummerfeldt, Your Honor, did.

JUDGE NORRIS: Now, your opposing counsel says that in June of '86 she got a bump of $3,300 and then, for her promotion and then in, I think it was 1987 promotion she got a $2,700 promotion.

You say that's not true?

MR. SINDELL: She received incremental increases.

JUDGE NORRIS: Well, this isn't incremental. The one was about 14 and a half percent and the other was almost 10. It doesn't sound like that's incremental.

MR. SINDELL: Well, let me show you why it is.

JUDGE NORRIS: Well, all right. What you're saying is it's not true that she got a promotional raise in '86 and '87.

MR. SINDELL: No. I'm saying she didn't get it in '88.

JUDGE NORRIS: Well, that's a little different. I thought you said she never got it.

MR. SINDELL: I meant from '88.

JUDGE NORRIS: Oh, from '88 on.

MR. SINDELL: Correct. She got it before that at the lower levels but she didn't get it after that.

JUDGE MERRITT: Well, didn't she get an increase of, '89, $2,500 or the next year $2,700, she got a series of raises of over $2,000 there for a number of years, so that by the time she left, she was making not quite double what she was at the beginning of the period.

MR. SINDELL: Yes. Over a ten year period, Your Honor. That's correct. Let's see here. I have --

JUDGE MERRITT: I wish they'd increase the pay of federal judges about that much.

MR. SINDELL: Well, I'm trying to find it right now. I don't have it. But there are charts specifically that indicates that the kinds of promotional increases that we're talking about are 25 percent, 15 percent, 30 percent, those are the kinds of promotional increases in this record that everybody who became a manager received when it was a promotion.

Now, there is a big difference there. They were recognized for $5,000, $10,000, $15,000 increments at percentages like that, not five percent, seven percent, most of which was based on her performance rating which was very high.

So she did get what appears to be high incremental percentages but she certainly didn't get the 25 percent or 20 percent that you find across the board.

JUDGE MERRITT: What about this fellow Wodak?

MR. SINDELL: Wodak wasn't really --

JUDGE MERRITT: The percentage increase there was less.

MR. SINDELL: Yes. His performance was less, too.

JUDGE MERRITT: Okay. Well, anyway your case is based on a comparison between the amount of salary increase that she got and what some of the other people got.

MR. SINDELL: Well, very generally. What's really true here is that her salary, Your Honor, was a function of receiving an inappropriate grade.

The lowest managerial, non-managerial grade was a 12.

JUDGE NORRIS: What's your position about, what's the woman's name, Moty or something?

MR. SINDELL: Mikel Moty.

JUDGE NORRIS: Mike Moty.

MR. SINDELL: Yes.

JUDGE NORRIS: Didn't Mr. -- the one you're complaining about, her manager refer this whole question when she protested about whether it was the appropriate level of her salary to Miss Moty and didn't she do an evaluation and decide that grade 12 was the proper grade for her to be in?

MR. SINDELL: No. That's not what the record shows. That's the whole point.

JUDGE NORRIS: They didn't refer to her?

MR. SINDELL: They didn't refer, they reported to her information that was totally incomplete. The record in this case shows that they couldn't make an evaluation of her job description because they didn't have her duties and Mr. Makofsky knew nothing about them and he testified that way and he said she has one little duty but he added on environmental and they said it didn't matter but the key here is that he had previously, before he presented anywhere recommended that it's a title change only, a title change only whether the job was hugely increased and he knew that and why wouldn't they talk to the manager who created the job.

Mr. Makofsky was totally out of the blue. He intervened in this thing without any reason, totally out of

their procedure and I believe it's because he didn't believe she should be a manager and that's exactly what happened.

Mr. Ray was the person to be consulted about this because he was her immediate supervisor. Mr. Makofsky was often connected and yet he was intervening and signing documents that he had nothing to do with to attempt to reach a conclusion that she shouldn't be given anything more than a title change and this was more than that --

JUDGE NORRIS: Is there evidence in the record that this company has no female managers?

MR. SINDELL: They certainly, in terms of DairyPak managers, there were no females. My client, among the Stanford managers in the company, she was the lowest paid whether you look at plant managers within DairyPak or peers in terms of their documents, she's the only female.

JUDGE NORRIS: Now, is Makofsky only in charge of DairyPak?

MR. SINDELL: He's only in DairyPak, yes, and he was the one who supervised her. Actually, if you look at this record, these promotional increases of 15, 20 percent, I wish I could locate that document right in front of me and I

will by the time I come back here, would indicate to you that she was simply denied that.

And what is their argument? Their argument is she wasn't promoted. Why wasn't she promoted? Because she didn't get a grade 13. Why didn't she get a grade 13? She was certainly a manager. 13 is the lowest managerial bracket and then they acted as if her move from safety coordinator to safety manager was nothing but a title change and that wasn't true. And Mr. Makofsky knew that.

But he recommended in a document that's been altered that there's no change at all. Those recommendations are typically funneled by compensation and there's a wealth of evidence in here that Miss Moty was not working from independent judgment.

As a matter of fact, Your Honor, it's stated in this record that Miss Moty writes to Mr. Makofsky about he agreed to the salary grade. He agreed between the two of them. To say that, you know, there's some kind of an independent assessment is absolutely ridiculous. It never was.

There's testimony in the record that Miss Carolyn, that one person, Miss Merritt, testified the true meaning, that whatever the supervisor recommends almost always is what they end up doing. And that's what happened here.

Except it should have been signed by Mr. Ray and not by Mr. Makofsky. And then let's take it eight years later, seven years later anyway, well, you think when they raised her grade to 13 she would have then have had a promotion in 1994 but no, they didn't give it to her then.

And by 1994 she had been doing all of those duties that Mr. Makofsky should have reported but didn't --

JUDGE NORRIS: Excuse me. At the time she moved in to grade 13, wasn't her pay already higher than the minimum allowed in grade 13?

MR. SINDELL: Yes. They overlap tremendously, Your Honor, all these different ranges, but again, my point in this case is not where she fell within this range, although I must tell you that there's example after example in this record where individuals who have had added job duties, which she certainly had, and this is entirely up to Mr. Makofsky, and they would receive $5,000, $6,000, $7,000. A fellow by the name of Robison, for example.

JUDGE MERRITT: Who gave her these good performance ratings?

MR. SINDELL: Mr. Makofsky, which I think is even more (inaudible) in this case.

JUDGE MERRITT: You do?

MR. SINDELL: Absolutely.

JUDGE MERRITT: Well, I don't know why if he doesn't like women in managerial positions that he would consistently give her a good performance ratings on up to the very end. Why would that be?

MR. SINDELL: Because that didn't have to do with her being a manager. He didn't give her any increase for all her responsibilities.

JUDGE MERRITT: I thought before that you told me that the case was premised on her being a manager like a number of other managers in the plant like, of course she was environment you say and safety and there were other people, managers that had to do with production and not with safety and the environment and that she should be treated like those production managers and that because she was a manager.

And then my question was, well, that being the case, why would -- if her boss didn't like women in manager positions would he give her such a high, consistently give her such a high rating in those management positions?

MR. SINDELL: You just said it, in this management position. He didn't consider her a manager. Sure he gave her incremental, what were resulting in incrementally a higher percentages on performance because

she did a good job which was not consistent with what he was required to do which was recognize that she was manager in the first place.

JUDGE MERRITT: But her title was manager.

MR. SINDELL: It sure was.

JUDGE MERRITT: Why, what is the proof that he didn't consider her as a manager?

MR. SINDELL: The overwhelming proof of it is the fact that he recommended that she stay at a grade 12. Under the rules that are in operation there, and if you'll look at page 933, it's stated right there in the record, it says 12, that's the highest non-managerial position for the safety engineering grid for this company.

Well, now there's a big difference even between a 12 and a 13.

JUDGE MERRITT: Well, now, she did get promoted to 13.

MR. SINDELL: Five years later.

JUDGE MERRITT: I don't follow. Why was it necessary to do it immediately? Why? I don't understand your logic. You're saying that he didn't want to have any women as managers.

MR. SINDELL: Right.

JUDGE MERRITT: Yet you're saying that he promoted her, that the highest non-manager job was 12 and he promoted her beyond that to a 13.

MR. SINDELL: He didn't.

JUDGE MERRITT: All right. Well, he didn't but somebody did, right?

MR. SINDELL: Yes. Five years later when she should have had a 13 minimally when she got the job.

You see, Your Honor, here is what it turns on. If she was a manager when she was promoted to the position of safety manager from safety coordinator, if she was a manager, by their own rules she should have had a grade 13, page 933.

JUDGE MERRITT: So it would be a breach of contract then. If they breached the contract, that's one thing, but --

MR. SINDELL: What if it's motivated by discrimination? What if it's motivated and it didn't --

JUDGE MERRITT: Then you have to prove it.

MR. SINDELL: Well, that's what I'd like to tell you about.

JUDGE MERRITT: Well, you've told me about it for 25 minutes. And I still don't understand it. I'll give you some time for rebuttal.

MR. SINDELL: Okay.

JUDGE MERRITT: And for 60 pages in your brief, and for 35 pages in your reply brief, counsel, you worked this case over but I still don't understand where the discrimination is.

MR. SINDELL: All right.

MR. ASHE: Good afternoon, Your Honors. First let me thank the court for its indulgence in the rescheduling for this hearing. It was purely a personal and I apologize for my office.

Mr. Sindell argued for 25 minutes but the court gives him rebuttal and I hope I can get something accomplished with my time.

JUDGE MERRITT: I wouldn't count on it.

MR. ASHE: We had color coded the chart for Ray, Miss Keyerleber acknowledged, Mr. Makofsky, (inaudible) and for Mr. Stuckey who came in later.

If you look at what she's fighting about in this case, I think the Court pinpointed this, she's fighting about the failure to be made a salary grade 13 back on October 1, 1988 when she was made safety manager.

The job was studied back, studied thereafter but if it was supposed to be a 13, it should have been a 13 then.

Mr. Ray even think to have the compensation department review it.

An important factor is the four or six year statute of limitations that applies in this case. All of that stuff about managerial and non-managerial is quoting a document that doesn't apply even to Miss Keyerleber.

JUDGE MERRITT: When was this case filed?

MR. ASHE: Well, 1994, October 27th.

JUDGE MERRITT: So you're saying that there was no complaint made about any discrimination?

MR. ASHE: Correct. There's never ever been an EEOC charge, there has never been an Ohio --

JUDGE MERRITT: She did complain at some point.

MR. ASHE: March '94 she sent a letter to Mr. Gidez, that's the first formal complaint we ever -- we have a hot line, an 800 number where we have an internal EO department and the law department people that can complain to, they have all the required posters on the board and so forth, no complaints whatsoever.

JUDGE MERRITT: So if she made a complaint in 1994 that she didn't think she was getting -- well, the nature of her complaint was sex discrimination.

MR. ASHE: Well, it's essentially comparable work.

JUDGE MERRITT: So then what was the company's response to that?

MR. ASHE: They evaluated her job and they submitted it back to compensation department. But she's out in Olmsted Falls, a Cleveland suburb. All of her management is headquartered in Stamford, Connecticut. She and Miss Paylos and her secretary were the last two holdouts in DairyPak that were not in Stamford. They were asked to move there for quite a long time.

In any event, she is flown in, the convene four other senior officials in the company plus the compensation department.

JUDGE: To Stamford?

MR. ASHE: Yes, sir.

JUDGE: Stamford?

MR. ASHE: Yes. They sit down and have a two hour meeting. She submits her own version of the, of her position description. They study it. This is done by Miss Moty.

By the way, all of the, all of the women in the compensation department, and it is female dominated. The head of it, Miss Kenaga is the vice-president, their number two is Miss Moty. They both outrank Mr. Makofsky and they're in a separate organization but they're higher up.

JUDGE MERRITT: In management in Stamford.

MR. ASHE: Yes.

JUDGE MERRITT: Where she was offered to be.

MR. ASHE: Where she was offered to be and with all respect to Mr. Sindell, he is dead wrong. Kummerfeldt was paid less to come to Stamford and once he got to Stamford, he was paid less than what was offered.

JUDGE MERRITT: So the compensation department did a study of it and the head of the compensation department is a woman and Miss Moty was the --

MR. ASHE: Was the number two person.

JUDGE MERRITT: And she was involved in the study, was she?

MR. ASHE: Yes, sir. And then since it had been studied before, she gave it an independent fresh look --

JUDGE MERRITT: Did Miss Moty and the female head of the compensation department know that this was a comparable work claim based upon gender?

MR. ASHE: No. They just knew that a desire was to review the accuracy of the salary grade assigned to Miss Keyerleber's job and to get a fresh look at it, Miss Moty even assigned it to Mr. Sobanski who looked at Miss Keyerleber's –

JUDGE MERRITT: Well, she complained, you're saying, and they did a study of the job and concluded what? MR.

ASHE: They concluded that internally it was still a 12. They looked at the external market and for the state and federal governments which placed increasing emphasis on safety and environmental issues to become more competitive as the market was moving up in compensation.

JUDGE GILMAN: Why did they call her safety manager to keep her grade a 12? And he's complaining they should have made her 13.

MR. ASHE: What he's complaining of, it is relating to engineers, it doesn't relate to anything she does. There are plenty of managers that are 12s and 13s. There's nothing magic about having the word manager in your title.

The only person she managed was a fraction of a secretary. She was a staff consultant. She went around and consulted. She filed a lot of paper.

JUDGE MERRITT: Now, the district court here says that there are other people whose managers are called managers who don't rate 13. I think Judge Webb says that in here and that's in the record, I think.

MR. ASHE: Yes, Your Honor. Some of them -- I mean there are managers all over the lot. By the way, another mistake for the record is that ironically DairyPak

had a plant manager in Olmsted Falls, the same location of the plaintiff, who was female, Nona Schumacher.

I mean to suggest that DairyPak didn't have female managers is nonsense. And a senior level person in that very same location, Nona Schumacher was female throughout, something like '82 through '91 so she was there for a very long period of time and very unusual and frankly in a manufacturing environment.

The DairyPak, just to enlighten the Court, just so you know what they do, they make these little things it's not rocket, with all due respect to my client, it's not rocket science, and then they make little trays for use with TV dinners and stuff at the one plant. And they take, they don't even manufacture the raw material. That's manufactured at the Waynesville and shipped down then they stamp it, color it, print it and fold it up to make it ready.

You see here that every year, if the plant can get over the fact that she didn't, she was left at salary grade 12 when she became safety manager, and if that's not barred by the statute of limitations, every time that she got a raise, it was at or even marginally above the maximum she could have gotten.

As the court pointed out to Mr. Sindell, she got excellent performance ratings.

In addition to all that Mr. Makofsky nominated her for and successfully got her in 1992 a special performance award of $1,000. This is over and above everything. It's the highest award in DairyPak that year. This is the guy who supposedly doesn't like women in management, but the law is not thoughtless. We look at actions. The actions reveal very fine performance ratings, he gave her very high ratings. He had discretion. There is a schedule of what you should get for a raise and there's a range and she was always at the discretionary high end of that range, not at the low end.

Coming back to the process in the spring of '94, it is evaluated according to the marketplace but still a 12 but moving towards a 13. So it's a 12 internally, it's still a 12 externally but it's pushing.

So essentially they said you can do, you can go either way. So they decided to resolve the doubt in her favor and go ahead and make the job a 13.

Well, but no good deed goes unpunished because we then, here we are. But it would have been a reasonable decision, defensible in court to have left her a 12 even then.

Now, she testified in her deposition that her duties were increasing throughout the '88, '89 and through the '94

period and, however, that they were changing. Essentially the mix went different. She had before about 20 percent environmentals to about 40 percent environmentals. That's the response to the laws (inaudible.) Our work as lawyers, your work as judges changes as congress passes new laws.

She wasn't working longer hours. She was still working the same work week and the same hours but the mix was evaluated by the female dominated compensation department.

And there's zero evidence in this record of any bias, any gender bias on the part of that female dominated, independent compensation department.

Now, we think they made the correct decisions but the law is not entitled to a correct decision. It entitles her not to have a decision that is controlled by gender bias, it entitles her to good, bad or indifferent decisions, as long as they're not controlled by gender bias. But we think they made good decisions. She just doesn't like them.

Not only the Sixth Circuit but every circuit Court of Appeals in this country looks at comparable work and rejected it as the law of the land. They don't want to get into the business of comparing apples and oranges.

And Judge Wells correctly pinpointed it when she quoted from plaintiff's own complaint talking about

similarly situated male employees performing services of comparable work, and that's in the first few pages of the summary judgment.

To compare a DairyPak plant, which is what she's doing, to a paper mill is like comparing a bicycle assembly plant to a major auto assembly plant that in addition to assembling the autos, makes its own steel.

I mean at a paper mill, a Champion paper mill, the trees have been cut down, they are brought in and they are changed to pulp, there's a rail yard, there's huge equipment and machinery, there's been fatalities in that environments.

DairyPak's never had a fatality in the history of the division. There are huge numbers of chemical treatments. There is huge numbers in that environment of chemical challenges. Many of those are built on rivers, which we appreciate what chemicals can do to us. It turns out now they are moving too slowly. So you got dioxin problems, you got all those things.

JUDGE GILMAN: And there's in the records about the statements that Mr. Makofsky said women had no business in management and that he goes to strip bars sometimes.

MR. ASHE: Well, let's deal directly with that, Your Honor. There is testimony that in 1992, excuse me,

1991, that on two occasions Miss Yuncker allegedly heard him say that women didn't belong in management. This is more than two years after the events that are being challenged here so it's a very different time, whether they deny it or not, it's neither here nor there.

JUDGE GILMAN: This is after the event.

MR. ASHE: Yes. After. In the meantime, all he has done is give her very high performance ratings and very high raises and the very next year he gives her a special performance award that he nominates her for which is the highest in the division.

His actions, and before this that he resubmitted, unlike Mr. Ray, who didn't think it was worth it, he resubmitted her employee job description to compensation back in '89, for further study and it did not produce an upgraded salary. So it caused Miss Moty did not -- and Miss Kenaga did not it deserved it. And it's possible that she was previously overgraded back when she was a safety coordinator but they decided for whatever reason, they decided after looking at it that a 12 was correct as of '88, '89 and she testified increasing in self-worth after '94 and then it is a very marginal decision. It could have gone either way. They decided to give her the 13 because the trend line seems to be moving in that direction.

Again, there's absolutely no indication any intention whatsoever of gender bias.

In addition to the two internal experts, we've Margaret Benson, a 20 year compensation expert who comes in and says, reviews the entire process again and says (inaudible)normally done.

And the whole reason to have a compensation department in a large corporation is to take out all the (inaudible) and get it reviewed independently so everything fits in to a logical sequence and that's what we find.

But maybe the law should involve comparable work but it doesn't, it doesn't in this circuit and it doesn't in any other circuit.

The basic problem that she has with her case is that Kummerfeldt, the male that succeeded her went into a salary grade 13 job. He got less money to come from a lower cost of living area in Pensacola to Stamford.

Terry Wodak, again, if we had bias on the part of Mr. Makofsky (inaudible). Keyerleber was the same performance ratings, routinely got higher increases than Wodak did.

Makofsky only supervised during this period two men, one male, one female, and routinely he gave more favorable treatment to Miss Keyerleber.

Miss Keyerleber was never, ever anywhere near close to the bottom of the salary range for her job.

Mr. Wodak had one bad performance year and one average performance year and he got paid accordingly. But even in the years when they were the same or graded the same, routinely Mr. Makofsky treated Miss Keyerleber substantially better than he treated Mr. Wodak.

As that old Wendy's ad used to say when the lady came home and looked at the competing hamburger, where's the beef.

We essentially have the situation in which plaintiff expects that her job was more important than other people thought it was and the company, than the company thought it was.

And the people making those decisions, there's a lot of speculation, there's a lot of innuendo, but there's no proof and we urge the court to look at the citations to the record that are proposed for this, for everything that Miss Keyerleber claims happened to her that was bad, that there were males that had the same experience.

I'll give you an easy example. When Mr. Makofsky took as Miss Keyerleber's secretary, excuse me, her supervisor, and if you believe her testimony about all she's doing, that's a major addition to his work load to supervise this. When he took over that, he didn't get a salary increase, he didn't get any salary upgrade. He just stayed the same.

In 1994 when you have a salary grade re-evaluation in place, the standard procedure, and this is pointed out in the briefs, this simply means that you get an increase at the next occasion. You don't get an immediate salary increase. She got one very quickly, July 1st, the very next pay period.

So because she went a little bit lower down in the compensation range for that grade, she got accelerated increases in the record. So it benefited her financially to move up and in instead of getting annual increases, she got them at 10 months and eight months.

The transfer to Stamford, I think the only other thing I would note is that a study in addition to the fact that it had been in the works for a long time and increasing pressure had been put on the executive staff, by the executive staff to accomplish it and they also have stated that there were three managers who were totally uninvolved

in this procedure and they recommended that everybody that had work should be there.

Now, ironically, most people who are career oriented will look upon it as an advantage to get an opportunity to come to headquarters for possible future progress.

One other thing in the comparison, Miss Keyerleber is frequently comparing herself to people that are graduate engineers, including Mr. Kummerfeldt who had a Master's degree, I believe, for the staffing of that job.

Miss Keyerleber came to Champion with a ninth grade education plus two years of drafts person training at a technical school. She applied for a drafts person job, she got the drafts person job. She worked in that job for nearly nine years and then she went over into the safety department.

She had an excellent career with Champion. We wanted her to continue it. If you look at the letters, Mr. Stuckey wrote to her saying please come. If you look at, she flew to Stamford with her family. She spent Sunday afternoon showing them around and then with his family took them out to dinner to encourage them to come to the community.

This is not the kind of welcome that is calculated to discourage somebody for coming.

JUDGE GILMAN: There's something in the record where one of her co-workers said that, well, you would have gotten canned if you transferred here.

MR. ASHE: Yes. A co-worker allegedly said that but he was not in a position of authority. Obviously raw speculation. She's obligated under the law to go and if she claimed she was mistreated we could be in court on that.

There's absolutely no reason to believe that the law does not permit her to speculate along those lines. She certainly by then knew how to protect herself and she had Mr. Sindell there as her attorney to help protect her as well.

And if she thought she was being retaliated, she was in court, she could have, if she was about to be fired, she could have sought a temporary restraining order or a temporary injunction if it would have stopped the issue.

But look at that record, her performance record. I mean can you imagine any company wanting to try to fire somebody with that record when they had went through all this effort to try to persuade her to move?

I mean they're not that suicidal. She had no iota of discipline in nearly 19 years at Champion. She was an excellent employee and we wished that she had stayed that

way, we wished she had stayed with us but we needed to get everybody to Stamford and she chose not to do it. That's her choice.

JUDGE MERRITT: All right, counsel, you're up. You said you didn't want any more time than your brother counsel here. You are about to transgress that. Go ahead.

MR. SINDELL: Thank you, Your Honor. First of all, the grid comprises the entire business unit, not just the engineers. Engineers weren't managers. There's nothing in this record, not one thing that will show you a manager who had a grade 12. It's not there.

What this case is about is gender discrimination. It's not comparable work. You have an individual here who not only made a couple of statements but when told that she was being excluded from meetings because of her female status, specifically laughed at it, never brought it up, never said --

JUDGE MERRITT: Well, there's nothing in the record that she was excluded from any meetings because of her female status, counsel.

MR. SINDELL: Really, he was the individual who excluded her, Your Honor. There it is in the record specifically said to her I don't want you in these meetings

and then after the meeting said this was a great meeting because there weren't any women there.

JUDGE MERRITT: Where is that in the record?

MR. SINDELL: It's in the record on page 11. Mr. Dorosiak testified –

JUDGE MERRITT: Is that a part of the appendix?

MR. SINDELL: I'm sorry, of my brief.

JUDGE MERRITT: That's not the record. Your brief --

MR. SINDELL: I see. I'm sorry, Your Honor. Here is where it is in the record. Page 19.

JUDGE MERRITT: Page what?

MR. SINDELL: It's 19. More specifically --here it is. 1977 through 1989. We'll find it. It would be in -- there it is. 1977 to 1980.

JUDGE MERRITT: What volume is this now?

MR. SINDELL: I'm sorry, Your Honor. It's volume four.

JUDGE MERRITT: Volume four and it is on page 1980?

MR. SINDELL: It's 1977 actually. It's the deposition of one of the individuals who was at that meeting.

JUDGE MERRITT: Who is it the deposition of here?

MR. SINDELL: This particular deposition was of a woman by the name of Mrs. McConnell who was at, particularly, and this is just one example in the record where she was excluded.

JUDGE MERRITT: And what line are you on?

MR. SINDELL: Well, the question starts on line five of 1977, "do you recall any remarks relating to women?"

The answer is "yes. At this meeting some people left the room. I heard a lot of talk together and I heard Mr. Anderson say they're only good on their back, they belong either in the kitchen or in the bedroom. I started to pay more attention. There was laughing and talking, referring to a black person as a big black chocolate chip cookie, getting very embarrassed," and then in another instance Mr. Dorosiak testified, and that is on page, of this record --

JUDGE NORRIS: Where is the one where you just told us that she was excluded from that meeting because she was a female? Now where is that?

MR. SINDELL: All right. That's at 1284 and 1285. And that's in volume three.

JUDGE MERRITT: Volume 3, 1284.

MR. SINDELL: Yes. I believe this was the second meeting. It's the deposition of Mr. Dorosiak who was present at that meeting.

JUDGE MERRITT: Mr. Who?

MR. SINDELL: Dorosiak is his name.

JUDGE MERRITT: Let me read along with you here.

JUDGE NORRIS: He was her supervisor?

MR. SINDELL: No. He was just present there at the meeting.

JUDGE MERRITT: Well, page 1284. What line are you?

MR. SINDELL: Well, the question is line six, "would you tell us what remarks Mr. Anderson made?"

Answer: At the conclusion of the meeting he kind of looked around and said that this meeting went quite well. You know, we really got through everything kind of fast and then he paused and then he said because there weren't any women involved.

JUDGE MERRITT: Uh-huh.

MR. SINDELL: Now, she brought these matters to the attention of Mr. Makofsky who supposedly is so kindly and told him these things and in the record in my brief I

point out that Mr. Anderson specifically asked her not to be in these meetings, didn't invite her.

These were meetings she was supposed to attend and when she brings it up to Mr. Makofsky, he says so what? He never talked to Mr. Anderson about it. And he's gender biased.

JUDGE NORRIS: When did Anderson, was he her supervisor at one point? Why did he cease being her supervisor?

MR. SINDELL: I believe it was in 1989 after she was safety manager. He didn't want her to be manager because he objected to the way he physically dealt with her and so Mr. Anderson or Mr. Makofsky took over but Mr. Anderson continued to have a good deal of influence over her livelihood in that company and kept excluding her from meetings and Mr. Makofsky had absolutely nothing to say about it.

This is a man who says these kinds of things in meetings, he was saying them all over. The record is full of it, Your Honor, and Mr. Makofsky who believes that women shouldn't be managers took no steps. (Inaudible) management training.

JUDGE NORRIS: What's that? It sounds like their words didn't follow their actions, did it?

MR. SINDELL: Well, they certainly did. If you take a look at the record here and you look at page 748, for example, and our 749, Mr. Beck, promotion, 13.8 percent increase, total increase.

Mr. Fritsch, 14 percent increase.

Mr. Oberstadt, 25 percent increase.

JUDGE NORRIS: Any of these get into this comparable work area?

MR. SINDELL: Not at all. Your Honor, the company can say whatever it says but my position is that when you are talking about a promotion and if male managers, whatever the position was is given 25, 15, 18 percent, it's all in the record, and she got -- you know how much she got? Zero.

JUDGE NORRIS: Why would these women who are number one and number two persons in the compensation department want to discriminate against her?

MR. SINDELL: They didn't. They were following orders. That's the whole point. What you need to --

JUDGE NORRIS: Now, Mr. Ashe has said those two women were higher up on the food chain that Mr. Makofsky.

MR. SINDELL: No. No. That's very misleading. Here is the way it worked.

If you look in the record at 559, this is the key document here that went to compensation. And in this document it says change in position title only.

Now, that wasn't true. And that would have kept her under the manager slot. That's the way they operate but our evidence shows that Miss Moty simply mimicked what was recommended by them all the time.

JUDGE NORRIS: Okay. I understand. Is it true or not true though that the person who was the head of the compensation department was higher up or lower down than Mr. Makofsky in the chain of corporate command at Champion?

MR. SINDELL: I think lower down because it is apples and oranges. There is no way I can compare the human resource department to Mr. Makofsky. He was director of administration in the corporate headquarters for the entire DairyPak division.

Now, I don't know if Miss Moty is higher or lower. It's different. It's not a pecking order because you've got two different functions here, I mean, in the whole company.

JUDGE NORRIS: But they didn't report to him though, that's correct, isn't it?

MR. SINDELL: Miss Moty did not report to him, no. But the practice of the company, Your Honor, was that

the compensation manager or the compensation analyst followed what was recommended in case after case after case.

JUDGE MERRITT: Who did the yearly compensation department report to?

MR. SINDELL: The head of the compensation department.

JUDGE MERRITT: Miss Moty, she was assistant and she --

MR. SINDELL: She reported to Miss Kenega.

JUDGE MERRITT: Who did she report to?

MR. SINDELL: I don't know who Miss Kenega reported to. I really don't.

JUDGE MERRITT: Okay. Thank you for concluding.

MR. SINDELL: Yes. I wanted to point out to you two things and move to a conclusion.

This is a case where a gender biased individual, I don't care what (inaudible) did, I won't argue about that, a very biased individual who denied her all kinds of things in this case decided that she shouldn't have, under any standard, a promotion.

This is a false document which contains so many different perversions and diversions that I can hardly believe it at all.

In addition to that on retaliation, it's important to know that yes, they went through all kinds of alleged welcome but it was behind the iron fist underneath the velvet glove.

Why would someone go to relocate if they were told you're going to have serious consequences for writing the letter.

JUDGE MERRITT: Wait. You're not making any additional points here and we're going to --

MR. SINDELL: I never said that before. Her manager, not co-worker, her manager told her.

JUDGE MERRITT: We're 55 minutes into this case and you're about 40 minutes into a case that you were given 15 minutes to argue.

And you are 100 pages into a limitation on your brief -- I believe there is no way you would stop talking about it unless, until I sit you down.

MR. SINDELL: Can I have 30 seconds?

JUDGE MERRITT: Yes.

MR. SINDELL: Thank you. The length of my brief has nothing to do with how this case should come out.

JUDGE: Well, it violates the rules.

MR. SINDELL: That doesn't mean my client ought to be punished for it.

JUDGE MERRITT: Well --

MR. SINDELL: And that's not fair.

JUDGE MERRITT: She ought to get a lawyer who abides by the rules of this court, counselor.

MR. SINDELL: I plead guilty, Your Honor. Punish me but don't punish her.

JUDGE MERRITT: Well, we may do that.

MR. SINDELL: And the other thing --

JUDGE MERRITT: Your 30 seconds is up.

MR. SINDELL: Thank you.

JUDGE: The case will be submitted. The court will stand in recess.

CERTIFICATE

I, Linda A. Astuto, a Notary Public within and for the State of Ohio, do hereby certify that I transcribed the foregoing tape-recorded proceedings in its entirety, that I wrote the same in stenotypy, and that this is a true and correct transcript of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of office, at Cleveland, Ohio, this _____ day of _____ A.D. 19__.

A. Astuto, Notary Public, State of Ohio
1750 Midland Building Cleveland, Ohio 44115
My commission expires October 25, 2002

CASE NO. 97-3796

In the
United States Court of Appeals
For The Sixth Circuit

GERLINDE KEYERLEBER,
Plaintiff-Appellant,

FILED
JUN 12, 1998

v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO AT CLEVELAND

FINAL BRIEF OF THE APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 97-3796

GERLINDE KEYERLEBER,

Plaintiff-Appellant,

vs.

CHAMPION INTERNATIONAL CORPORATION,

Defendant-Appellee.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to the 6th Cir. R. 25, Gerlinde Keyerleber makes the following disclosure:

1. Is said party a subsidiary or affiliate of publicly-owned corporation? **No**

   If the answer is YES, list below the identity of the percent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? **No**

If the answer is YES, list the identify of such corporation and the nature of the financial interest:

_____ June 8, 1998

STEVEN A. SINDELL (Date)
(Attorney for Plaintiff-Appellant)

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

This is a factually complex case involving exhibits and testimony gleaned and presented from thousands of pages of documents produced in discovery as well as from over 7,500 transcript pages of deposition testimony. Based upon this counsel's extensive appellate experience, he believes and urges that oral argument is indispensable for a full and fair review in this appeal.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an employment gender discrimination and retaliation case brought by Appellant entirely pursuant to Ohio law under R.C.§4112.99 and §4112.02(A), (I) and (J).

This instant appeal is as of right pursuant to R. 4(a)(1) of the Federal Rules of Appellate Procedure.

STATEMENT OF ISSUE FOR REVIEW

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND IN ENTERING JUDGMENT THEREUPON IN FAVOR OF APPELLEE.

STATEMENT OF THE CASE

The Complaint in this action was originally filed by Appellant in the Cuyahoga County Common Pleas Court. (R.1, JA Pg. 22-27). Appellee removed this action to the United States District Court for the Northern District of Ohio in Cleveland on the basis of diversity of citizenship of the parties. (R.1, JA Pg. 18-21).

On June 16, 1997, the trial court granted Appellee Champion's Motion for Summary Judgment on all of Appellant's claims and entered judgment in favor of Appellee. (R.164 and 165, JA Pg. 28-43).

On July 3, 1997, Appellant timely filed her Notice of Appeal from the District Court's Judgment of Dismissal, thereby perfecting this instant appeal as of right. (R.166, JA Pg. 44).

STATEMENT OF FACTS

INTRODUCTION

This is an action under O.R.C. §4112.99 (Attached as B-5) for gender discrimination and retaliation, including constructive retaliatory discharge.[1]

Appellant has established a *prima facie* case of gender discrimination under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). She is a member of a protected class. Adverse employment actions were taken against her by upper management, including her immediate supervisor attached to Champion DairyPak Corporate Divisional Headquarters. The reasons for the adverse actions were sex bias against her as a female, which bias was causally related to the adverse actions in question. Moreover, Appellee's claimed legitimate reasons for the adverse actions are pretextual.

---

[1]For convenient reference in this brief, please note the following abbreviations: EPD=Exempt Position Description; EAF=Employee Action Form; and EPERR=Exempt Position Evaluation and Ranking Recommendation. The EPD and EPERR apply to a position. The EAF applies to an employee.

Additionally, Appellant has established a triable question of fact on the issue of gender discrimination through the direct method of proof.

Finally, Appellant has established retaliation, including constructive retaliatory discharge in that she was constructively terminated because of her complaints and objections to the gender discrimination visited upon her by Appellee.

The factual bases for our claims will be presented hereafter in the following format:

I. Gender bias and motivation on the part of decision-makers in upper management;

II. The causal relationship between the gender bias and the adverse actions taken against Appellant with respect to her salary grade and her salary, including with respect to promotional increases;

III. Champion's claimed legitimate business reasons and Appellant's evidence of pretext;

IV. Retaliation.

The facts of this case can be boiled down to the following evidence: Mr. Makofsky, Appellant's immediate supervisor from October, 1989 to August, 1993, believed and repeatedly stated that "women had no business in management in a company." (R.154: Marlena Yuncker depo., Pg. 33-35, JA Pg. 2358-2360). At the time these statements were made, Appellant was Safety Manager of the DairyPak Division of Champion and one of several department managers within that DairyPak Division. She was the only female departmental manager in DairyPak and the only female manager under the immediate supervision of Mr. Makofsky. Although she clearly had been promoted (in 1988) to this managerial position of Safety Manager, her salary grade remained unchanged at its previous nonmanagerial grade for her prior position of Safety Coordinator. No exempt male employee in the DiaryPak Division was treated in this manner. She received no promotional salary increase for several years while she was Mr. Makofsky's immediate subordinate; exempt male employees were not treated in this manner. She was excluded from business meetings of her peers because she was a woman. She was denied training and advancement opportunities to which she was entitled, unlike exempt male employees.

Notwithstanding her many complaints to Mr. Makofsky about gender bias directed against her, exclusion from meetings, deprivation of training opportunities, as well as inequitable salary grade and salary, Mr. Makofsky not only was indifferent to her concerns, but also took specific steps to insure that her salary grade and salary remained for years at a nonmanagerial level. In other words, Mr. Makofsky, who openly stated his belief that women should not be managers (at a time when he was Appellant's immediate supervisor) made absolutely certain that Appellant did not receive either a departmental managerial salary grade or a departmental managerial promotional salary increase; Mr. Makofsky was indifferent to the gender bias resulting in Appellant's exclusion from business meetings, nor did he afford Appellant the opportunity to obtain necessary managerial training. IN SHORT, MR. MAKOFKSY'S ACTIONS WERE AS GOOD AS HIS WORD.

We will outline the retaliation facts in the appropriate section hereafter.

I. GENDER BIAS AND MOTIVATION ON THE PART OF DECISIONMAKERS IN UPPER MANAGEMENT, PARTICULARLY MR. MAKOFKSKY.

Appellant began employment with Champion on October 1, 1977 (R.92: Memorandum by Defendant Champion in Support of its Motion for Summary Judgment, Ex. 116, JA Pg. 559-560). Her employment terminated on June 9, 1995. (R.92: id., Ex. 36, JA Pg. 150). Thus, she was a Champion employee for almost 18 years. Prior to her promotion to the department managerial position of Safety Manager, DairyPak, in 1988, she had been a Safety Coordinator. (R.124: Apx. to Pl's Opp. To S.J., Ex. 28, JA Pg. 926-929).

From 1988 through August 1994, Appellant's three immediate supervisors included Messrs. Robert Ray, Andy Anderson and Barry Makofsky. (R.124: id., Ex. 5, JA Pg. 676).

As Director of Administration of DairyPak, Mr. Makofsky rated her performance. (R.124: id., Ex. 50 JA Pg. 1075-1076). Appellant's performance was consistently above average and Champion is not claiming any performance failure on her part in support of any of its legal contentions. Mr.

Makofsky had the responsibility to deal with the Compensation Department regarding Appellant's job description and grade evaluation.[2] He had the authority to recommend and approve salary increases in recognition of added responsibilities. (R.147: Deposition of Mikel Moty, Pg. 319, JA Pg. 2046). He had the authority to recommend and approve her salary grade, even on an EAF before Compensation graded the position. (R. 148: Moty depo., Ex. 39, Pg. 5, JA Pg. 2140, within 2135-2143 and Ex. 40, Pg. 9 JA Pg. 2153, within 2144-2154; R.140: Deposition of Michele Kenaga, Pg. 60-61, JA Pg. 1603-1604). He had the authority to approve her participation in management training programs. (R.111: Deposition of Gerlinde Keyerleber, Pg. 1010-1011 JA Pg. 1696-1697; R.124: id., Ex. 49, at P.6, JA Pg. 1072, within 1069-1074). Mr. Makofsky has been a Champion employee for over 30 years and, among other positions, served for several years in the early 1980's as a Compensation Analyst and Manager in the Compensation Department.

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[2]At Champion, it was not appropriate for the employee to go directly to Compensation to present job description or grade evaluation material. This was done through the employee's immediate supervisor. (R.140: Kenaga depo., Pg. 57, JA Pg. 1602).

(R.124: id., Ex. 52, JA Pg. 1083-1085). Therefore, Mr. Makofsky was familiar with the evaluation and ranking procedures for grade analyses in the Compensation Department and the way to fill out job descriptions in an effective manner. (R.144: Deposition of Martin (aka "Barry") Makofsky, Pg. 77, JA Pg. 1930)

In 1991, (R.154: Deposition of Marlana Yuncker, Pg. 146, JA Pg. 2370) ON TWO SEPARATE OCCASIONS MS. YUNCKER HEARD MR. MAKOFSKY STATE TO MR. ANDERSON THAT "WOMEN HAD NO BUSINESS IN MANAGEMENT IN A COMPANY." (R.154: Yuncker depo., Pg. 33-34, JA Pg. 2358-2359). Ms. Yuncker further testified that "I heard from several women that their exact words were that Barry had no use for women in management positions in the company." (R.154: Yuncker depo., Pg. 35, JA Pg. 2360). AT THE TIME THAT THESE REMARKS WERE MADE, PLAINTIFF WAS THE ONLY FEMALE MANAGER WHOM MR. MAKOFSKY DIRECTLY SUPERVISED. INDEED, BASED ON THE RECORD IN THIS CASE, THERE IS NO OTHER FEMALE MANAGER WHOM MR. MAKOFSKY EVER DIRECTLY SUPERVISED.

Ms. Heidi Palos had the position title of Manager of

Business Systems in DairyPak. (R.150: Deposition of Heidi Palos, Pg. 41, JA Pg. 2233) Mr. Makofsky, as Director of Administration, approved a salary for Mr. Emmitt Dove as a new hire far greater than Ms. Palos' salary.[3]/[4] (R.124: id., Ex. 53, JA Pg. 1086-1088).

Mr. Makofsky regarded women as sex objects.

He transmitted a color image of a nude female to the computer of Ms. McConnell, a secretary in Olmsted Falls. (R.150: Palos depo., Pg. 34-35, JA Pg. 2231-2232; R.151: id. Pg. 360, JA Pg. 2263; R.142: Deposition of Marguerite McConnell, Pg. 26-31, JA Pg. 1981-1986). He repeatedly made remarks about his sexual interest in women in the workplace to Appellant and other female employees. (R.126: Keyer. depo., Pg. 1922-1924, JA Pg. 1843-1845; R.150: Palos depo., Pg. 26-31 and 35, JA Pg. 2225-2230 and 2232;

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[3]When Mr. Dove was hired, Ms. Palos had been a Champion employee for 17 years. Ms. Palos and Mr. Dove at all times had IDENTICAL JOB DESCRIPTIONS AND JOB TITLES. She initially trained Mr. Dove to do the same job she was doing. (R.150: Palos depo., Pg. 70, JA Pg. 2237).

[4]He gave approval for Mr. Dove to attend certain conventions at Champion's expense, but refused to approve them for Ms. Palos (R.150: Palos depo., Pg. 86-89, JA Pg. 2239-2242).

R.151: id., Pg. 345, JA Pg. 2248). When Mr. Makofsky came from Stamford to Olmsted Falls, he brought his pornographic collection with him (R.142: McConnell depo., Pg. 27-32, JA Pg. 1982-1987; R.115: Keyer. depo., Pg. 771-772, JA Pg. 1687-1688; R.111, id. Pg. 1076-1077, JA Pg. 1703-1704; R.126: id. Pg. 1932-1934, JA Pg. 1848-1850; R.134 or R.159: Deposition of Martin Dorociak, Pg. 29-31, JA Pg. 1288-1290). Mr. Makofsky himself testified that he and Mr. Ray viewed pornographic materials during work hours in Mr. Ray's office in Olmsted Falls. (R.144: Makofsky depo., Pg. 244-245, JA Pg. 1955-1956). According to the Executive VP of the Printing and Writing Business Unit, William Burchfield, this kind of conduct would not be tolerated at Champion. (R.130: Burchfield depo., Pg. 75-76, JA Pg. 1235-1236).

In understanding Mr. Makofsky's gender bias, it is important to note his shocking indifference to Appellant's numerous complaints to him regarding the outrageous mistreatment she received from Mr. Anderson (who was Appellant's immediate supervisor for a month or so prior to Mr. Makofsky becoming Appellant's immediate supervisor). (R.124: id., Ex.5, JA Pg. 676).

Shortly after Mr. Anderson became Appellant's immediate supervisor, she was exposed to Mr. Anderson's

inappropriate form of greeting women --- he grabbed her from her front and kissed her on the cheek and lips. (R.113: Keyer. depo., Pg. 518, JA Pg. 1664). He similarly greeted Ms. McConnell (R.142: McConnell depo., Pg. 13, JA Pg. 1973) and Ms. Yuncker (R. 154: Yuncker depo., Pg. 50, JA Pg. 2366). Plaintiff testified that she found the Anderson hello "sickening." (R.126: Keyer. depo., Pg. 1902, JA Pg. 1835).

The next occasion when Mr. Anderson went to the Olmsted Falls Office and attempted to greet Appellant in the same way Appellant, by her body language, made it clear to Mr. Anderson that she did not care for this form of greeting from him. (R.113: Keyer. depo., Pg. 519, JA Pg. 1665). Mr. Anderson, thereafter, desisted. However, after having been thusly "rejected" by Appellant, Mr. Anderson, immediately thereafter, began treating Appellant in a rude, humiliating and discriminatory manner (R.113: Keyer. depo., Pg. 541-542, JA Pg. 1668-1669), clearly impacting negatively on her job and advancement opportunities. Shortly thereafter, Mr. Makofsky informed Appellant that Mr. Anderson no longer wanted Appellant to report to him; that it would be better for Appellant if he, Mr. Makofsky, became her immediate supervisor instead of Mr. Anderson. The switch occurred effective September/October 1989. (R.111, Keyer. depo., Pg.

977-979, JA Pg. 1692-1694; (R.124: id., Ex.5, JA Pg. 676). Mr. Anderson, then VP Manufacturing, (Mr. Makofsky was then Appellant's supervisor), INTENTIONALLY EXCLUDED APPELLANT FROM MANAGERS' MEETINGS which Appellant had not only previously attended, but also arranged and organized. (R.113: Keyer. depo., Pg. 600-603, JA Pg. 1675-1678; (R.124: id., Ex.4, JA Pg. 671-675).

Ms. McConnell testified that: "The majority of remarks that I personally heard him (Anderson) make about women were in a derogatory manner." (R.142: McConnell depo., Pg. 15, JA Pg. 1975).

At a meeting in Olmsted Falls in 1990 or 1991 (R.142: McConnell depo., Pg. 15, L. 22, JA Pg. 1975), Ms. McConnell testified to hearing Mr. Anderson make the following remarks in her presence:

> **Q**: "All right. Now, getting back to Mr. Anderson, do you recall any remarks that he made RELATING TO WOMEN OR FEMALES AT THAT MEETING?
>
> **A**: Yes. At this meeting...I heard loud talking at the other end of the table and I heard Mr.

> Anderson saying THEY'RE ONLY GOOD ON THEIR BACK AND THEY BELONG EITHER IN THE KITCHEN OR THE BEDROOM.
>
> ...Mr. Anderson said she's nothing but a big fat chocolate chip cookie (referring to Ms. Taylor, a secretary in Stamford who is a black Jamaican) and I looked around...and I was very embarrassed and I looked at other people around the table and they all had their head down..." (R.142: McConnell depo., Pg.17-19, JA Pg. 1977-1979). (Emphasis added).

Appellant herself, on several occasions, personally heard Mr. Anderson state that "women belong in the kitchen" and that women "should have a set of knitting needles" "like (his) wife." (R.126: Keyer. depo., Pg. 1912-1914, JA Pg. 1836-1838).

Mr. Dorociak testified that in the Summer of 1992, at the conclusion of a meeting in Olmsted Falls at which Mr. Dorociak was present, he heard Mr. Anderson state: "this meeting went quite well...we really got through everything

kind of fast and then (Mr. Anderson) paused and said it's "BECAUSE THERE WEREN'T ANY WOMEN INVOLVED." This was the type of meeting Appellant typically attended.[5] (R.134 or R.159: Dorociak depo., Pg. 19-20, JA Pg. 1284-1285).

Ms. McConnell also testified:

> "I did hear him (Anderson) on different occasions make derogatory remarks about women in management and he did state that his feeling was THEY DIDN'T BELONG IN MANAGEMENT, THEY BELONGED AT HOME AND THAT THEY DIDN'T BELONG IN A CORPORATE STRUCTURE." (R.142: McConnell depo., Pg. 23, JA Pg. 1980). (Emphasis added).

THE EVIDENTIARY RECORD IN THIS CASE IS

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[5]With respect to this meeting at Olmsted Falls in July, 1992, (attended by Messrs. Dorociak, Anderson and others, including DairyPak VP General Manager Howard Gidez), Appellant was the only female on the original agenda. About an hour and a half before the meeting, Mr. Anderson told Appellant "I don't want you in this meeting." (R.116: Keyer. depo., Pg. 163, JA Pg. 1627).

SUBSTANTIAL SUPPORTING THE FACT THAT APPELLANT REPEATEDLY COMPLAINED AND OBJECTED TO MR. MAKOFSKY ABOUT MR. ANDERSON'S SEXUAL DISCRIMINATION AND ABUSE DIRECTED TOWARDS HER.[6]

When confronted with Appellant's objections and complaints regarding Mr. Anderson, Mr. Makofsky took no action whatsoever. He simply laughed with amusement

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[6]R.112: Keyer. depo., Pg. 67-70, and Pg. 594, JA Pg. 1609-1612. (Complaint to Makofsky about Anderson's exclusion of Appellant from meetings and Anderson's gender-biased comments); R.113: id., Pg. 501, JA Pg. 1660 (about Anderson's remark that women should not be in management); R.116: id., Pg. 160-165, JA Pg. 1624-1629 and R.113: id, Pg. 594-596, JA Pg. 1672-1674 and 603, JA Pg. 1678 (about Anderson's exclusion of Appellant from July, 1992 Olmsted Falls meeting); R.113: id., Pg. 517-519,. JA Pg. 1663-1665 (about Anderson's kissing and hugging Appellant); R.115: id., Pg. 618-623, JA Pg. 1680-1685 (about Anderson's belittling remarks to Appellant at the Lake Logan meeting); R.144: Makofsky depo., letter to Mr. Gidez dated 4-25-94, Ex. 27, JA Pg. 1971 (agreeing that Appellant complained to him about being excluded from meetings); R.124: id., Ex. 6, Affidavit of Plaintiff, Pg. 3, Para. 14, JA Pg. 677-679A and R.142: McConnell depo., Pg. 15-18, JA Pg. 1975-1978 (about Anderson's reference in a meeting to a black female secretary in Stamford as a "big fat chocolate chip cookie" and Mr. Makofsky's response that this matter was "too sensitive" for him to inquire into or get involved with).

indicating "That's how Andy is." (R.113: Keyer. depo., Pg. 502, JA Pg. 1661). According to Mr. Anderson, Mr. Makofsky never even spoke to him concerning any of Appellant's concerns on these matters. (R.127: Anderson depo., Pg. 135-137, JA Pg. 1205-1207).

Appellant testified to Mr. Makofsky's specific reactions to her objections to Mr. Anderson's conduct and comments, as follows:

> "Regarding Mr. Andy Anderson's issue, the comments, he (Makofsky) almost like kind of laughed a little bit, like it was almost amusing, and to me it was not. And he said I don't know what I can do about it, I just don't know... this is a very touchy situation and it's very sensitive, and that's the type an answer I got. I did not get an answer from him." (R.112: Keyer. depo., Pg. 74, JA Pg. 1613).

Again, Mr. Makofsky's indifference to Mr. Anderson's gender-discriminatory comments and conduct regarding Appellant is further evidence of Mr. Makofsky's indifference to gender discrimination. It is still further corroboration of his belief that women should not be managers in a corporation.[7]

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[7]Mr. Makofsky denied Appellant management training she requested and to which she was entitled as a new manager. This was Champion's MDC program. Male managers, such

II. **THE CAUSAL RELATIONSHIP BETWEEN THE GENDER BIAS AND THE ADVERSE ACTIONS TAKEN AGAINST APPELLANT WITH RESPECT TO HER SALARY GRADE AND HER SALARY**

The following are the primary ways in which Appellant was discriminated against on the basis of her female gender:

1. She was promoted on October 1, 1988 to a management position, with considerably greater responsibilities than she had in her previous position as Safety Coordinator; notwithstanding this promotion and increased responsibility, her salary grade and salary remained unchanged for years thereafter, except for the small incremental Annual Salary Increase based on performance;

2. Unlike other male managers,

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as Messrs. Fritsch and Beck, were permitted to attend. (R.:111: Keyer. depo., Pg. 1010-1016, JA Pg. 1696-1702; R.124: id., Ex. 49, JA Pg. 1069-1074; R.145: Merritt depo., Pg. 46-48, JA Pg. 2013-2015; R.138: Gerber depo., Pg. 346-347, JA Pg. 1455-1456).

notwithstanding her promotion to Safety Manager, she never received a promotional salary increase at any time from the date of her promotion to Safety Manager up until her separation from Champion in June, 1995;

3. Even within the salary range for her Grade 12, she never received any salary increase for the continually increased job responsibilities added to her position of Safety Manager;

4. Even when in 1994, her salary grade was increased from 12 to 13, the increased salary grade did not result in any increased salary;

5. She was denied opportunities for which she was eligible and to which she was entitled with respect to management training, notwithstanding the fact that she had a managerial position.

Mr. Makofsky, through August of 1993, was directly

instrumental and responsible for these adverse employment consequences suffered by Appellant.

Mr. Ray, (Vice-President, Manufacturing Services, DairyPak) first became Appellant's immediate supervisor in June, 1986. (R.124: id., Ex. 5, JA Pg. 676). He promised Appellant that becoming Safety Manager was a promotion, that she would have more and greater responsibilities and that she would receive a higher grade and salary (TO BE COMPARABLE TO HER PEERS, MESSRS. BECK AND FRITSCH) (R.117: Keyer. depo., Pg. 1463-1465, JA Pg. 1742-1744; R.126: id., Pg. 1916-1917, JA Pg. 1840-1841; R.117: id., Pg. 1434-1437, JA Pg. 1734-1737).[8] Mr. Ray told

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[8]Appellant's peers, to whom Mr. Ray was referring, are Messrs. Fritsch (Graphic Arts Manager) and Beck (Production Engineering Manager) as listed on Appellant's March 1, 1989 EPD (R.124: id., Ex.9, JA Pg. 701, within 698-701). Through August, 1989, all three of these DairyPak departmental managers, Appellant (Safety), Fritsch (Graphic Arts) and Beck (Production Engineering) reported from the same organizational level directly to Mr. Ray, their common immediate supervisor. In 1989, Mr. Beck had a salary grade of 16 (R.124: id., Ex. 21, JA Pg. 898) and an annual base salary of $58,000 (R.124: id. Ex.17.1, JA Pg. 749); Mr. Fritsch had a salary grade of 15 (R.124: id., Ex. 21, JA Pg. 898) and a salary of $53,000 (R.124: id., Ex. 17.1, JA Pg. 750). Appellant's unchanged salary grade remained a 12 (R.124: id., Ex. 21, JA Pg. 898) and her unchanged salary

this to Appellant prior to October 1, 1988, the date she assumed her new position of Safety Manager. (R.111: Keyer. depo., Pg. 1141, JA Pg. 1715; (R.92: id., Ex. 116, JA Pg. 559-560). After Appellant became Safety Manager, her paycheck and salary grade remained the same, while her work responsibilities expanded to include many new safety and environmental duties.[9]

Seven months after Champion's first discovery

(except for incremental annual performance increases) remained $36,000 (R.124: id., Ex. 17.1, JA Pg. 748).

[9]Champion, including DiaryPak, had the practice of increasing salaries within a salary range of a grade in recognition of added responsibilities---without a grade increase. This was done on the authority of that employee's immediate supervisor (R.148: Moty depo., Pg. 463-464, JA Pg. 2099-2100). For example, John Stuckey, Appellant's immediate supervisor, received a $5,400 salary increase for added responsibility in 1992 (R.124: id., Ex.17, JA Pg. 746, 753, 759 & 760, within 746-780). The same is true for Ted Robison, a Safety Engineer who, in 1988, due to the addition of one plant to his responsibilities, received a $5,000 increase (R.124: id., Ex. 17, JA Pg. 747, 751 & 772, within 746-780). When Appellant's responsibilities were increased by adding to her responsibilities---among many other additions--the Waynesville plant, she received no increase whatsoever. (R.144: Makofsky depo., Pg. 137-141, JA Pg. 1936-1940; R.117: Keyer. depo., Pg. 1530, JA Pg. 1795).

productions, Champion produced Appellant's EAF for her assumption of the Safety Manager position (R.92: id., Ex. 116, JA Pg. 559-560), with the effective date indicated as October 1, 1988. THIS PARTICULAR EAF WAS APPROVED BY MR. MAKOFSKY (PER HIS SIGNATURE) ON JANUARY 10, 1989 --- OVER 3 MONTHS AFTER PLAINTIFF ASSUMED THE "NEWLY CREATED" POSITION OF "SAFETY MANAGER." Typewritten in the pre-printed "comments" box on the EAF were the words "Change in position title only." This is intended to convey the meaning that Appellant's grade remained unchanged, her salary remained unchanged and her job responsibilities remained unchanged. According to this EAF, the only change was the name of the title of her position. But this EAF did not reflect the actual truth, as Messrs. Ray and Makofsky knew, namely, that Plaintiff's job responsibilities had greatly expanded, far beyond those of Safety Coordinator. (R.124: id., Ex. 27, JA Pg. 908-912). This EAF document (R.92: id., Ex. 116, JA Pg. 559-560) is pretextual as will be discussed hereafter. Its contents are untrue and there is reason to believe that it was fabricated and/or altered by Champion for purposes of this litigation.

Appellant continued to be paid within a Grade 12

salary range as Safety Manager, the same Grade 12 she previously held as Safety Coordinator. Plaintiff knew nothing of this EAF until it was produced, belatedly, in discovery. (R. 118: Keyer. depo., Pg. 2189-2190, JA Pg. 1882-1883). At this time, all she knew was that she had been promised a promotion, a significant salary grade and salary increase, but that all she received was greatly expanded responsibilities[10] and a change in the name of her title.

Not until March 1, 1989, 5 months after the effective date of Appellant's assumption of her Safety Manager position, did Mr. Ray first submit to her an unsigned EPD with a job description.[11]

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[10]Compare Safety Coordinator EPD (R.124: id., Ex. 28, JA Pg. 926-929) with Appellant's actual job responsibilities written out by Appellant during her deposition at the request of defense counsel. (R.124: id., Ex. 27, JA Pg. 908-912); (R.117: Keyer. depo., Pg. 1492-1548, JA Pg. 1757-1813), where Appellant extensively testified concerning her vastly increased responsibilities as Safety Manager.

[11]Appellant told Mr. Ray she thought the job description was inadequately detailed (R.124: id., Ex. 58, Pg. 3 of 20, JA Pg. 1129-1150 and R.116: Keyer. depo., Pg. 115, JA Pg. 1622) but Mr. Ray told her not to worry --- it was the peers which counted and that she was being promoted with a grade and salary increase in line with her peers. (R.126: Keyer. depo., Pg. 1916-1917, JA Pg.1840-1841 and R.117,

Totally in the dark about what had really occurred, Appellant continued to implore Mr. Ray to complete the "paperwork" right up until Mr. Ray left Champion in August, 1989. (R.118: Keyer. depo., Pg. 2189, JA Pg. 1882). Appellant specifically advised Mr. Makofksy of Mr. Ray's promises to her shortly after Mr. Makofsky became her immediate supervisor in October, 1988. (R.144: Makofsky depo., Pg. 125-126, JA Pg. 1931-1932). Thereafter, she repeatedly requested Mr. Makofsky to effectuate Mr. Ray's promises and to rectify the obvious grade and salary inequity between herself and plant managers, herself and Messrs. Fritsch and Beck and herself and other loss prevention supervisors in Champion. (R. 112: Keyer. depo., Pg. 80, JA Pg. 1614 and R.118: id., Pg. 2189, JA Pg. 1882; (R.144: Makofsky depo., Pg. 125-127, JA Pg. 1931-1933).

Unbeknown to Appellant until discovery in this case, Mr. Makofsky purportedly sent a letter to Ms. Moty of Compensation dated April 26, 1989, (R.124: id., Ex. 22, JA Pg. 899), noting Appellant's added RCRA (environmental) duties and asking Ms. Moty if a salary grade change was

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id., Pg. 1461-1465, JA Pg. 1740-1744). Mr. Ray certainly did not tell Appellant that the only change was in the name of her job title! Nobody ever did.

warranted. MR. MAKOFSKY'S BRIEF LETTER ADDED NOTHING THAT WAS NOT ALREADY ON PLAINTIFF'S EPD. (Compare R.124: id., Ex. 10, JA Pg. 702-705 with R.124: id., Ex. 22, JA Pg. 899).

As indicated, an actual position grade evaluation of the Safety Manager job was not done by Compensation until May 9, 1989. (R.137: Gerber depo., two-sided Ex. 10, JA Pg. 1377-1378). Ms. Moty, (per Champion, on an "informed" and "independent" basis), determined in her EPERR (of May 9, 1989) (R.137, id., JA Pgs.1377-1378) that the newly created Safety Manager position, to which Plaintiff had been promoted 7½ months earlier, should have the exact same salary grade as her previous Safety Coordinator position, EVEN THOUGH ON THE EPD FOR SAFETY MANAGER THE SCOPE, RESPONSIBILITY, PEERS, INDEPENDENT AUTHORITY, NUMBER OF EMPLOYEES INDIRECTLY SUPERVISED, ET CETERA HAD SIGNIFICANTLY INCREASED AS COMPARED TO HER PREVIOUS SAFETY COORDINATOR POSITION. (Compare Safety Coordinator EPD (R.124: id., Ex. 28, JA Pg.926-929) with Safety Manager EPD (R.124: id., Ex. 9, JA Pg. 698-701); also see (R.124: id., Ex. 23 and 24, JA Pgs. 900-903- & 904-907); (R.117: Keyer. depo., Pg. 1492-1548, JA Pg. 1757-1813) and

(R.124: id., Ex. 27 and 27A and 27B, JA Pg. 908-925).[12]

Not only did Appellant request an explanation for no

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[12]Mr. Makofsky, (who had himself worked in Compensation for several years in the early 1980's) claimed to have communicated with Ms. Moty about Appellant's salary grade evaluation (the EPERR of May 9, 1989) after he became her immediate supervisor (in October, 1989). Mr. Makofsky claims he had this communication with Ms. Moty upon the request of Appellant. (R.144: Makofsky depo., Pg.125-128, JA Pg. 1931-1934). Mr. Makofsky claims he was advised at this time by Corporate Compensation that Safety Manager was not considered a promotional increase because there was no grade change. (R.144, id., Pg. 126-127, JA Pg. 1932-1933). Mr. Makofsky also claims that he then so advised Appellant. (R.144, id., Pg. 128, JA Pg. 1934). Mr. Makofsky's credibility on these matters is in question. Appellant denies that Mr. Makofsky or anyone else told her why her grade remained the same, why she was never promoted or why she did not receive any salary increase. Mr. Makofsky never told Appellant that he had talked to Ms. Moty or Compensation. (R.118: Keyer. depo., Pg. 2189-2190, JA Pg. 1882-1883); R.116: id., Pg. 245-246, JA Pg. 1636-1637; R.111: id. Pg. 1144-45, JA Pg. 1718-1719). Moreover, Ms. Moty denies that Mr. Makofsky ever contacted her or, to her knowledge, the Compensation Department, concerning Appellant's Grade 12---at any time AFTER May 16, 1989 when, by memo, she so informed Mr. Makofsky. (R.106 or R.149: Moty depo., Pg. 76-77, JA Pg. 2179-2180), referring to R.107: Moty depo., Ex. 9, Memo from Moty to Makofsky dated May 16, 1989, JA Pg. 708).

salary or grade change, but she also continued to persist in those requests through 1990, 1991, 1992 and 1993 to Mr. Makofsky (who took no action). (R.144: Makofsky depo., Pg. 125-127, JA Pg. 1931-1933; R.116: Keyer. depo., Pg.187-188, JA Pg. 1630-1631 and Pg. 245-246, JA Pg. 1636-1637); (R.111: id., 1142-1145, JA Pg. 1716-1719); (R.117: id., Pg. 1461-1469, JA Pg. 1740-1748) and (R.118: id., Pgs. 2150-2151, JA Pg. 1878-1879 & 2189-2190, JA Pg. 1882-1883). Finally, on March 4, 1994, Appellant took the courageous step, in writing, of informing Champion/DairyPak that she believed she was a victim of gender discrimination. (R.124: id., Ex. 30, JA Pg. 930-932).

At this point, upper management, including specifically V.P. General Manager Gidez, was faced with not just 7½ months of inequity, but rather 5½ years of it! (R. 114: Keyer. depo., P. 1257, JA Pg. 1723). (R.116: Keyer. depo., P. 188, JA Pg. 1631; R.111: id., Pg. 1142-1145, JA Pg. 1716-1719 and R.118: id., P. 2189-2190, JA Pg.1882-1883. APPELLANT HAD A NON-MANAGERIAL SALARY GRADE (R.124: id., Ex. 31, Bates #6958, JA Pg.933, within 933-934) WITH A MANAGER'S TITLE AND A

MANAGER'S JOB RESPONSIBILITIES.[13] (R.137: Gerber depo., Pg. 93-150; 186, JA Pg. 1315-1372 & 1376); (R.145: Merritt depo., Pg. 60-61, JA Pg. 2017-2018). The impact of years of inequity carried with it significant financial impact to Appellant. This would include loss of pay, ineligibility for annual management incentive bonuses, (R. 144: Makofsky depo., Pg. 210, JA Pg. 1954; R.136: Gidez depo., Pg. 432-438, JA Pg. 1589-1595)[14] absence of promotional or added

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[13]It should be noted that the "Safety Engineering Grid for Business Unit - Nonmanagerial Positions" of November, 1989, done by "MAM" (which stands for the initials of Mikel A. Moty) obviously applies only to positions involving Loss Prevention/Safety, including within the Printing and Writing Business Unit of which DairyPak was a part. (R.124: id., Ex. 31, Bates #D6958, JA Pg. 933 and 939, within 933-944).

[14]Champion's written material indicates Grade 12 exempt employees were eligible for participation in Management Incentive Bonuses (R.124: id., Ex. 32, JA Pg. 945-1000); the practice apparently was not to consider anyone in a position graded below 15. However, Mr. Burchfield testified that the salary grade of an employee's position was not a criteria at all for participation in the Management Incentive Bonus Program. (R. 130: Burchfield depo., Pg. 20-26, JA Pg. 1227-1233 specifically, Pg. 22, JA Pg. 1229, LL. 12-13). Mr. Gidez testified that a "big determining factor" in Appellant not being considered for an Annual Management Incentive Bonus was that "she wasn't on the list when I got there." (R.136: Gidez depo., Pg. 437, JA Pg. 1594). In the

responsibility salary increases (beyond the performance based Annual Salary Increase)[15] as well as an adverse effect on her

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years 1988 through 1992, all of Appellant's male peers as listed on her 1989 EPD (R.124: id., Ex. 10, JA Pg. 702-705), namely Messrs. Fritsch and Beck, received annual Management Incentive Bonuses. Their annual management incentive bonuses ranged between $3,500 and $14,500 (R.124: id., Ex. 32D, JA Pg. 961-966, within 945-1000).

[15]There are two types of salary increases: Annual Salary Increases available to all employees within the range of a salary grade of 0 to 8%, depending upon the employee's performance rating (R.124: id., Ex. 33, JA Pg. 1001, within 1001-1009) AS WELL AS A GRADE-CHANGE PROMOTIONAL AND/OR NON-PROMOTIONAL ADDED RESPONSIBILITY INCREASE of 10 to 25%. (R.124: id., Ex. 17, JA Pg. 746-747, within 746-780). From October 1, 1988 to June 9, 1995 when she left Champion, Appellant NEVER received a promotional or added responsibility increase --- even though during this period she had BOTH significantly increased responsibilities AND, in 1994, a grade increase from 12 to 13. She did receive Annual Salary Increases due to her high performance ratings of 2.4% to 7.9%. (R.124: id., Ex. 17, backup documents Ex. 17.1, 17A-17Z, JA Pg. 748, within 746-780). As of 1990, Plaintiff was performing the same expanded duties that she was performing in 1994, when her grade was raised to 13. (R.124: id., compare Ex. 27, JA Pg. 908-925; Ex. 44, JA Pg. 1038-1042; and Ex. 46, JA Pg. 1050-1060; (R.117: Keyer. depo., Pg.1492-1494 JA Pg. 1757-1759) (and id. Pg. 1508-1548, JA Pg. 1773-1813)...40 pages of transcript detailing the duties Plaintiff had as Safety Manager which she did not have as

pension. (R.109: Report of Appellant's economist, Dr. Rosen: Ex. 4, JA Pg. 2279-2283 and Ex. 8, JA Pg. 2284-2340 and Pg. 39, JA Pg. 2276 and Pg. 111-112, JA Pg. 2277-2278). Eventually, while still employed with Champion, Plaintiff filed suit (on October 14, 1994).

III. CHAMPION'S CLAIMED LEGITIMATE BUSINESS REASONS AND APPELLANT'S EVIDENCE OF PRETEXT.

A. Champion claims that even if incorrect, Compensation (Ms. Moty) made a legitimate, independent business judgment with respect to Appellant's salary grades in 1989 (Grade 12) and 1994 (Grade 13).

(i) Neither Compensation nor Ms. Moty exercised independent or final judgment in determining Appellant's salary grade.

Ms. Moty herself testified that Compensation does not

Safety Coordinator). This would necessarily indicate that her grade should have been above salary grade 12 several years earlier.

always make the final decision, but does so "often" or "mostly." (R.105: Moty depo., Pg. 241-242, JA Pg. 2217-2218). According to Mr. Gerber, Ms. Moty "did not make independent decisions." (R.139: Gerber depo., Pg. 584-585, JA Pg. 1533-1544). Appellant testified that "the salary grade was decided by DairyPak management." (R.118: Keyer. depo., Pg. 2196-2197, JA Pg. 1884-1885 and R.124: id., Ex. 19, JA Pg. 797-799). Ms. Moty's May 16, 1989 letter to Mr. Makofsky states:

> "This will confirm that salary Grade 12 has been AGREED TO for the above subject position based on a comparison of internal and external market data." (R.124: id., Ex. 12, JA Pg. 708).

Mr. Makofsky's input concerning Appellant's job responsibilities could not have been factual.[16]

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[16]In December, 1992, Mr. Ellis, Plant Engineer at Olmsted Falls, (whom Mr. Makofsky did not supervise), had additional (or "dual") responsibilities added to his position duties. Exactly as was the situation for Appellant, these added duties included environmental responsibilities. At the time, the EPD for Mr. Ellis' new position (including the expanded responsibilities) had been evaluated by Ms. Moty as a Grade 13. Mr. Makofsky wrote to Mr. Ellis' supervisor, Mr.

Mr. Makofsky testified as follows:

Q: "When she became a safety manager from her previous position of safety coordinator, do you know whether or not there were any changes in her job responsibilities?"

A: No, I don't." (R.144: id., Pg. 128, ll. 14-18, JA Pg. 1934).

(ii) Ms. Moty had insufficient information to make a grade evaluation on May 9, 1989 of Appellant's Safety Manager position.

MacMillan, that due to Mr. Ellis' "dual responsibilities," Mr. Ellis will be "different." "Different" meant an increase to Grade 14. Ms. Moty obediently signed off on Mr. Ellis' EAF for a Grade 14, without any evaluation of this newly created position. (R.144: Makofsky depo., Pg. 176-186, JA Pg. 1943-1953; R.124: id., Ex. 51, JA Pg. 1077-1082). However, when Appellant's position had environmental and other responsibilities added to her existing Loss Prevention duties as Safety Manager, Mr. Makofsky somehow didn't see her as having "dual" or greater or "different" responsibilities warranting any indication or approval that her salary grade should be raised. (R.144: id., Pg. 171-172, JA Pg. 1941-1942).

It will be recalled that this March 1, 1989 EPD for Safety Manager was the primary source of Ms. Moty's information on Appellant's Safety Manager responsibilities. (R.124: id., Ex. 13, Pg. 2 JA Pg. 712, within 710-738; R.146: Moty depo., Pg. 78-79, JA Pg. 2036-2037). However, the job description on this EPD was so vague that it would be difficult to do a full and accurate grade evaluation based upon it. (R.128: Bentson depo., Pg. 116-118, JA Pg. 1212-1214 and Pg. 134, JA Pg. 1215). The only added responsibility which Mr. Makofsky may have mentioned to Ms. Moty had to do with some environmental areas such as RCRA. (R.124: id., Ex. 10, JA Pg. 702-705). But Mr. Makofsky did not even know what RCRA was. He testified it was "Record Keeping Retention Act." (R.144: id., Pg. 133, JA Pg. 1935).[17]

As previously noted, in 1988-1989, Mr. Makofsky's factual input was nil. And thereafter, through August, 1993, Mr. Makofsky submitted no further information to enlighten Ms. Moty.

(iii) The Employee Action Form (EAF) for Appellant's Safety Manager position is an altered and/or fabricated document.

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[17]It is the "Resource Conservation and Recovery Act."

The evidence indicates that the EAF for Appellant's Safety Manager position is a fabricated and/or altered document, designed to show that Appellant's assumption of the Safety Manager position was a lateral move from Safety Coordinator and not a promotion to a managerial position requiring a higher grade and a promotional salary increase. (R.92: id., Ex. 116, Bates #D7787-D7788, JA Pg. 559-560 and/or R.124: id., Ex. 15, Bates #D7787, JA Pg. 744). An Employee Action Form is the authorization and justification for paying an employee a particular salary within a particular salary grade range at a particular time. For a new position (including a grade or title change), the EAF was initiated by the employee's immediate supervisor and submitted by that supervisor to Human Resources (Compensation). The supervisor's recommended grade was based upon knowledge, studies and information available to the supervisor. Although Ms. Kenaga (Corporate VP of Compensation) had final approval authority, in theory, the recommended grades, salaries and position titles on these EAF's "WERE NOT CHANGED...IT WENT TO HUMAN RESOURCES AND THEN IT WAS APPROVED AND RETURNED TO US GENERALLY AS ACCEPTED OR AS RECOMMENDED."

(R.145: Merritt depo., Pg. 254-257, JA Pg. 2027-2030; R.148: Moty depo., Ex. 39, specifically Pg. 5, Bates D3779, JA Pg. 2140, within 2135-2142). A true EAF (if there ever was one) should have indicated what Mr. Ray promised Appellant --- a promotion requiring a significant salary and salary grade increase comparable to her peers, Messrs. Fristch and Beck. What the evidence really demonstrates is that Mr. Makofsky, though not Appellant's immediate supervisor, could not abide Appellant becoming a Divisional Safety Manager with a significantly increased salary and salary grade, comparable to Messrs. Fritsch and Beck. So Mr. Makofsky intervened with Compensation to see to it that the only change for Appellant would be limited to the name of her title. The evidence supporting these conclusions is as follows:

1. Ms. Yuncker testified that she did not type the words "change in position title only" inside the comments box in the lower left. She is sure she typed something else in that box, although she cannot recall what it was. Ms. Yuncker was "sure" that the words "change in position title only" were typed on a different typewriter than the words "safety manager," which she knows

she typed on the typewriter she used at the time. (R.154: Yuncker depo., Pg. 2O-28, JA Pg. 2347-2355).

2 Appellant made every conceivable discovery attempt to obtain the original EAF document in question: On July 10, 1996, at Ms. Yuncker's deposition (R.154: Yuncker, Pg. 27-28, JA Pg. 2354-2355); in a supplemental Request for Production of Documents responded to by Champion on August 14, 1996, (R.124: id., Ex.37, JA Pg. 1010-1012); and in Supplemental Interrogs. on October 7, 1996 (R.124: id., Ex. 38, JA Pg. 1013-1024 Interrogs Nos. 2 and 3). Champion responded that "despite a diligent search, due to passage of time, it is unable to locate the requested document" and "that during this litigation, Champion has always worked from a photocopy of this document." (R.124: id.) Why would the original of one of the most critical documents in this case be lost? Coincidence?

3. Even the copy of this EAF, belatedly produced by Champion in January, 1996, was mixed in with a second production of all previously produced EAF's. The original bates numbers of EAF's produced in the Fall of 1995, contained bates numbers in the lower 4,000 series. Obviously, a bates number D7787 is a later production.

4. Among the first documentary productions by Champion of Appellant's EAF's (in the 4,000 bates series), in the Fall of 1995, was a Salary History Report listing all change actions reflected in EAF's, including even non-salary actions.[18] The EAF at issue was not listed on this Salary History Report at the time it was printed out on June 21, 1994. (R.124: id., Ex. 18F, JA

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[18]This document has been included in the Joint Appendix per Appellant's Motion granted by this Court of Appeals (filed with the Clerk on May 8, 1998). It is located at R.124: id., Ex. 18F, JA Pg. 796.

Pg. 796). This date is after Appellant put Champion on written notice that she believed she was the victim of gender discrimination and that she was "thinking about possible legal actions." (R.124: id., Ex. 30, JA Pg. 930-932); (R.92: Apx. to Memo. in Support of Def's Mot. for S.J., Ex. 38, JA Pg. 154-156); (R.117: Keyer. depo., Pg. 1448-1449, JA Pg. 1738-1739). Several things are clear: Mr. Makofsky had his hands on the original, which is "lost" and, (unlike other EAF's of Appellant), was either never entered into the computer or deleted.

5. At no time between September of 1988 until Appellant's employment concluded with Champion in June of 1995 was Appellant ever told by anyone that her position of Safety Manager was a change in position title only. In light of the many inquiries she made of Mr. Makofsky and others, why would she never have been so advised?

6. All of Appellant's other EAF's carry the approval signatures (in the lower left corner) of Appellant's current supervisor at the time as well as the signature of the immediate superior of Appellant's immediate supervisor. (R.92: Apx. to Def's Memo. for S.J., Exs. 4, 7, 8, 11, 14, 15, 18, 21, 25 and 30, JA Pgs. 127-128, 129-130, 131, 132, 133-134, 135-136, 137, 138, 147, 149). This is Champion's practice and written policy. (R.148: Moty depo., Ex. 39, Pg. 5, JA Pg. 2140, within 2135-2143 and Ex. 40, Pg. 9, JA Pg. 2153, within 2144-2154). However, the EAF in question does not have the signature of Mr. Earl Bensing on it, the immediate superior of Appellant's supervisor, Mr. Robert Ray. Instead of Mr. Bensing's signature, that of Mr. Makofsky appears. Mr. Makofsky was not in any direct reporting relationship to Mr. Ray, nor was he Appellant's immediate supervisor at the time. It is anomalous, to say the least, that Mr. Makofsky's signature

would appear where it does. Mr. Makofsky did not become Appellant's supervisor until September/October of 1989, some 9 or 10 months later.

7. On this EAF, the effective date in the upper right-hand corner is listed as October 1, 1988. Just below is the printed space for "LAST PERS.CHG.DATE." The "last personnel change date" should indicate a point in time prior to the effective date of the current action or change. This is the case for every other EAF produced by Champion pertaining to Appellant. (R.92: id., JA Pg. 127-138, 147 & 149). However, while the effective date is indicated as October 1, 1988, the last personnel change date is listed as December 21, 1988, two months AFTER the effective date. This makes no sense whatsoever. What occurred on or about December 21, 1988? There is no document evidencing any particular action on that date.

8. Another anomaly with respect to this EAF is the fact that on all other EAF's of Appellant, (R.92: id., JA Pg. 127-138, 147 & 149) the approval signatures in the lower left-hand corner precede the effective date (or, in one instance, follow it by a couple of days). This makes sense because the approval of the EAF should obviously precede its effective date. However, unlike all of the other EAF's, the signature of Mr. Makofsky is January 12, 1989, three and one-half months AFTER the effective date of October 1, 1988. Mr. Ray's signature in the lower left-hand corner (which is hardly visible) does not have a readable date.

9. There is yet another peculiarity, this one concerning Appellant's EPD of March 1, 1989. (R.124: id., Ex. 10, JA Pg. 705, within 702-705). Mr. Ray had given Appellant an unsigned copy of that EPD in early 1989. It was attached to the original Complaint filed in this action along with annexed Requests for Admissions.

(R.124: id., Ex. 9, JA Pg. 698-701). In response to Appellant's Request for Admissions, Champion admitted on June 16, 1995, early in this litigation, that Appellant's unsigned EPD attached to the Complaint was the true and authentic one. (R.124: id., Ex. 40, JA Pg. 1027-1032). However, Appellee thereafter produced a copy of the same document, signed by Mr. Ray and Mr. Makofsky (date of execution not indicated) WITH "PLANT MANAGERS" WHITED-OUT. (R.124: id., Ex. 10, JA Pg. 705, within 702-705). (This was not apparent until Appellant asked to see the original). There is also some additional writing in the hand of Ms. Moty (R.147: Moty depo., Pg. 204-208, JA Pg. 2039-2043) on the EPD produced by Appellee. One might ask what benefit could Champion derive by whiting out "plant managers" from the EPD? Obviously, at one time, Mr. Ray apparently considered "plant managers" to be among Appellant's peers. Peers were

not typically listed in accordance with the printed definition on the EPD, but rather in accordance with the views of the immediate supervisor as to those persons similarly situated in the level of responsibility with the incumbent.[19] There is no evidence as to who whited-out "plant managers" or as to whether or not the EPD was actually executed with or

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[19]Makofsky: ("you would list the peer positions that made the most sense...people reporting to the same level of management"). (R.144: Makofsky depo., Pg. 59, LL. 1-9, JA Pg. 1919); Mr. Makofsky operated in this manner in practice: see Plant Engineer EPD, prepared by Mr. Makofsky. (R.124: id., Ex. 20, JA Pg. 844-845, within 844-897 and specifically 20-K, JA Pg. 889, within 886-889). Gerber: ("positions in the same department that were comparable in scope and responsibility," whether or not they reported to the same supervisor.) (R.137: Gerber depo., P. 40, LL. 4-19, JA Pg. 1314); Merritt: ("people who have the same level of responsibility as the individual that is being compared with another individual") (R.145: Merritt depo, P. 320, LL. 4-14, JA Pg. 2034); MacMillan: (with respect to EPD documents, peer positions mean "comparable positions" --- comparing Messrs. Fritsch and Beck to Plaintiff) (R.141: MacMillan depo., Pg. 58, LL. 4-15, JA Pg. 1909, and Pg. 59-60, JA Pg. 1910-1911); (R.126: Keyer. depo., Pg. 1916, LL. 17-25, JA Pg. 1840; Pg. 1917, LL. 1-4, JA Pg. 1841).

without the whiting out. Opposing counsel opined (without evidence) that a secretary took this step in order to "correct" the document. What we see as particularly significant is the fact that with respect to a single employee, two separate and critical documents (the EAF and an EPD for the position in issue) have been altered. There is no evidence of any other document for any other employee being whited-out or altered.

(iv) Ms. Moty's May 9, 1989 EPERR was patently contrived to conform with Mr. Makofsky's view that women should not be in management positions and that Appellant's position as Safety Manager was, in fact, a change in title only.

In order to accept Appellant's Safety Management position from 1989 to mid-1994 as a Grade 12, (i.e., a change in title only from her previous position title as Safety Coordinator), one would have to conclude that any changes

between her previous Safety Coordinator position and subsequent Safety Manager position were insignificant and incidental. This is so contrafactual as to be beyond any exercise of legitimate business judgment. In Appellant's Safety Coordinator position, she had no environmental responsibilities. (R.124: id., Ex. 28, JA Pg. 926-929). In her Safety Manager position, 40% of her responsibilities were environmental. (R.128: Bentson depo., Pg. 99, JA Pg. 1211). As a Safety Manager, Appellant had both environmental and loss prevention/safety responsibilities for multi-facilities at the regional level in DairyPak. These expanded responsibilities included numerous federal and state environmental and safety laws and regulations.[20] A superficial comparison of Appellant's Safety Coordinator position (R.124: id., Ex. 28,

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[20]Resource Conservation & Recovery Act (RCRA); Hazardous & Solid Waste Amendments (HSWA); Hazardous Materials Transportation Act (HMTA); "Superfund" and its Amendments and Reauthorization Act (SARA); Safe Drinking Water Act (SDWA); Occupational Safety and Health Act (OSHA); and Toxic Substances Control Act (TSCA); (R.131: Deposition of Edward Clem, Pg. 29-47, JA Pg. 1244-1262; R.124: id., EHS Issue Team Report, P.4 of Ex. 16, JA Pg. 745). At the end of 1989 or beginning of 1990, Plaintiff was assigned an additional facility, Waynesville. (R.144: Makofsky depo., Pg. 137-138, JA Pg. 1936-1937).

JA Pg. 926-929) with her Safety Manager position (R.124: id., Ex. 27, JA Pg. 908-925); (R.117: Keyer. depo., Pg. 1484 and testimony through Pg. 1545, JA Pg. 1749-1810); (R.124: id., Ex. 44, JA Pg. 1038-1042 and Ex. 46, JA Pg. 1050-1060) reveals the far more extensive responsibilities of Safety Manager.

Charles Gerber was employed with Champion for over 17 years, concluding in 1994. In 1989, Mr. Gerber became Corporate Loss Prevention Director. (R.137: Gerber depo., Pg. 12-20, JA Pg. 1292-1300). Throughout those years, he worked with Appellant. (R.137: id., Pg. 19-20, 115-116, JA Pg. 1299-1300). He thoroughly understood the job responsibilities of Appellant because he worked with her. (R.137: id., Pg. 20, JA Pg. 1300). Mr. Gerber was the most tenured person at the corporate level in the Loss Prevention Department regarding safety in the paper mills and plants. (R.139: id., Pg. 569, JA Pg. 1518). There was nobody at Champion who had more knowledge concerning the job responsibilities of paper mill loss prevention supervisors and the DairyPak Safety Manager job of Appellant, including Ms. Moty. (R.137, id., Pg. 114-115, JA Pg. 1336-1337; R.139: id., Pg. 569-570, JA Pg. 1518-1519).

Moreover, Mr. Gerber was thoroughly familiar with

the salary grade and range systems of Champion; he frequently dealt with the Compensation Department, including EPD changes and functional responsibilities of his subordinates; he possessed personal knowledge of grade levels and assisted in grading and re-grading positions. (R.139: id., Pg. 582-584, JA Pg. 1531-1533; R.124: id., March 9, 1987 Memo, Ex.56, JA Pg. 1093, within 1091-1099).

He reviewed the actual external comparison job descriptions Ms. Moty used and concluded that none of them accurately described Plaintiff's actual responsibilities, but rather grossly under-described them. (R.137: id., Pg. 93-150. JA Pg. 1315-1372 and Ex. 12, JA Pg. 1386-1406 and 13, JA Pg. 1407-1411). According to Mr. Gerber one external position he compared with Appellant's position was "top corporate manager." He testified that this was closest to Appellant's position. The salary range for this external position was considerably higher than Appellant's salary. (R.137: id., Pg. 112-119, JA Pg. 1334-1341; R.137: id., Ex. 12 and 13, JA Pg. 1386-1406 & 1407-1411).

Ms. Moty was asked about a specific internal comparison she made (in her 1989 EPERR of Appellant's Safety Manager position) to the position of supervisor, Loss Prevention, Camden - Corrigan, a Grade 13. (R.124: id., Ex.

11, JA Pg. 706-707). To begin with, Ms. Moty testified SHE NEVER EVEN LOOKED AT THE JOB DESCRIPTION FOR THIS COMPARISON POSITION. (R.148: Moty depo., Ex. 43, Bates 7023-7024, JA Pg. 2159-2160, within 2156-2165 and Bates 4139-4142, JA Pg. 2161-2165). She relied on her "general knowledge of the jobs to do the evaluation." (R.148: Moty depo., Pg. 492, JA Pg. 2110). From her "general knowledge" she specifically wrote the following in the EPERR (R.124: id. Ex. 11, JA Pg. 706-707) to justify a Grade 12 for Safety Manager:

> "SUBJECT POSITION IS RANKED ONE BELOW (the compared Camden-Corrigan position) FOR SIMILAR, REASONS DECIDED ABOVE, PARTICULARLY SINCE THE SUBJECT POSITION IS MORE ADVISORY IN NATURE RATHER THAN HAVING FULL OPERATIONAL RESPONSIBILITY," (Emphasis added). (R.124: id., Ex. 11, JA Pg. 706-707).

In fact, the Camden - Corrigan EPD (R.124: id., Ex. 56, JA Pg. 1091-1099), did not indicate "full operational responsibility," but rather, just like Appellant's position, was advisory in nature. After writhing and twisting through pages of transcript with inane testimony about why Camden - Corrigan had "some" (R.148: Moty depo., Pg. 505, L.2, JA

Pg. 2123) operational responsibility, (R.148: id., Pg. 485-513, JA Pg. 2103-2131), MS. MOTY FINALLY AGREED SHE DID NOT REMEMBER WHAT SHE MEANT BY "FULL OPERATIONAL RESPONSIBILITY" AND CONCLUDED THAT SHE DIDN'T KNOW IF APPELLANT, AS SAFETY MANAGER, HAD "FULL OPERATIONAL RESPONSIBILITY." (R.148: id., Pg. 511, JA Pg. 2129).

Then Ms. Moty testified that what really did it for her as to the Camden - Corrigan position having "full operational responsibility" was the incumbent's "reporting relationship to the Employee Relations Manager." (R.148: id., Pg. 505, JA Pg. 2123). Three pages later, however, this reporting relationship "isn't significant. It was a piece of information." (R.148: id., Pg. 509, JA Pg. 2127).

When then asked if there was some kind of significant difference between the Camden - Corrigan position reporting to the Employee Relations Manager and Ms. Keyerleber reporting to Mr. Ray, the Vice-President of Operations at DairyPak, Ms. Moty had to have the question repeated three times before giving the response: "There is a difference. I really could not say what the significance of it is without doing more research and analysis." (R.148: id., Pg. 509-511, JA Pg. 2127-2129).

(v) Champion claims Appellant's Safety Manager position was nonmanagerial.

Certainly, Mr. Ray thought Safety Manager was a managerial position. (R.126: Keyer. depo., Pg. 1916-1917, JA Pg. 1840-1841). So did Appellant, Gerber, Merritt and Bentson. (R.137: Gerber depo., Pg. 112, JA Pg. 1334: "responsibility for an entire operating division"; R.138: Gerber depo., Pg. 276-277, JA Pg. 1452-1453: safety manager was "a hybrid position...somewhere between a Loss Prevention Supervisor and the Environmental Health and Safety Manager at a mill"; R.145: Merritt depo., Pg. 59-61, JA Pg. 2016-2018 "...I would have expected that she would have been graded equal to other Safety Managers"; R.128: Bentson depo., (Champion's Compensation Expert), Pg. 238-239, JA Pg. 1220-1221: "She clearly was the Loss Prevention Manager. That was her title. She had seven facilities that she had supervisory responsibility for. That is clear and is part of the documentation that I have been provided.")

Ms. Moty, who is responsible for grading Appellant's Safety Manager position, defined a "managerial" position as one which "generally supervises a function and may or may not supervise people who are engaged in the activities of that

function." (R.148: Moty depo., Pg. 372, JA Pg. 2083). While her definition of "managerial" would certainly include Appellant's position of Safety Manager, (Appellant indirectly supervised plant managers), Ms. Moty testified that she was unable to say whether or not Appellant, as Safety Manager, had a "managerial" position. (R.148: id., Pg. 380, JA Pg. 2091).

Ms. Moty is the Champion Compensation Analyst, whom Champion claims exercised independent legitimate business judgment to determine the salary grade for Appellant's position in 1988 and, along with Mr. Sobanski, in 1994. In fact, Ms. Moty's testimony on every key issue in this case is uninformed and at times ridiculous. If this Court considered nothing else but her testimony in this record, we believe the conclusion would be irresistible that Champion's so-called legitimate business reasons are untrue and pretextual. We urge that any fair review of this record must include an examination of certain sections of Ms. Moty's testimony, to-wit, (R.148: Moty depo., Pg. 360-387, JA Pg. 2071-2098), along with the testimony she gave as previously discussed herein at pages 21-23, supra.

This is a sample of her testimony:

Q: "Why can't you just tell from

this particular document (Appellant's EPD, R.124: id., Ex. 10, JA Pg. 702-705) whether or not it's a managerial position, safety manager?

MR. ASHE: Objection. Compound question.

A: I would want to get some more clarity around the areas of responsibility.

Q: What clarity around what areas?

A: Primarily the first two areas.

Q: `Assist and direct management in each location to organize and direct safety programs to insure compliance with OSHA standards.' What is it that needs clarity there for you?

A: I'd want to know more about exactly what that means and what those responsibilities entail.

Q: Okay. Would you tell me what

type of responsibilities you would be looking for in that regard to determine whether it's a managerial position.

A: I don't know.

Q: In other words, you don't know what you'd be looking for to clarify it in order to determine whether or not it was a managerial position?

A: That's correct.

Q: And if you don't know what you're looking for, why would you need to look?

MR. ASHE: Objection. Argumentative.

Q: Answer that, please.

MR. ASHE: Objection. Not a question.

A: The additional information would help me form some, you know, opinions about the level of responsibilities in these areas.

Q: What kind of information are you looking for that would help you form your opinion about whether or not it's a managerial position?

A: Well, perhaps information around day-to-day responsibilities --- information on level of decision making.

Q: What kind of information on level of decision making would you expect to find to determine that she was a manager or managerial position, excuse me?

A: I really don't know. It would be different probably for each job.

Q: In her case what kind of decision making level of responsibility would indicate to you that she had a managerial position?

A: I don't know.

* * *

Q: Where would you look to obtain the additional information you would need to have in order to determine if Miss Keyerleber as safety manager had a managerial position?

A: In this particular case I would probably talk to Barry Makofsky." (R.148: id., Pg. 381-384, JA Pg. 2092-2095).

(v) Champion claims Appellant was not entitled to a promotional salary increase.

The whole issue of promotion is tied to whether or not Appellant's salary grade should have been raised when she became a Safety Manager. Pertinent to her salary grade is whether or not the position of Safety Manager was a "managerial" position. If Safety Manager was a "managerial" position, her salary grade should have been higher than Grade 12, by Champion's own definition. (R.124: id., Ex. 31, Bates 6958, JA Pg. 933, within 933-944).

We say that there are triable questions of fact as to whether or not the assignment of Grade 12 was a legitimate business decision or the result of Mr. Makofsky's gender-motivated intercession. We say that there is, at minimum, a triable question of fact as to whether or not Safety Manager was a "managerial" position. In short, our contention is that Champion's claim that Safety Manager was a Grade 12 position, exactly the same as her previous Safety Coordinator position, is pretextual. We contend that Champion's claim that Safety Manager was a "nonmanagerial" position is pretextual. We further contend that Champion's claim that Appellant was not "promoted" is also pretextual. We therefore contend that Champion's claim that Appellant was not entitled to a promotional raise is pretextual.

Champion claims that "no promotion," "nonmanagerial position" and "Grade 12" are all supported by legitimate business reasons. We say this record reveals material factual conflict as to whether these claimed legitimate business reasons are anything other than untrue cover-ups for Mr. Makofsky's real motivation to keep Appellant in a lesser, nonmanagerial status without promotional increase because women should not hold management positions in a corporation. One thing is clear: male employees who were

promoted from a nonmanagerial to a managerial position or assumed an upgraded position received promotional increases. (R.124: id., various charts, Exhibits 17, JA Pg. 746-747; 17.1, JA Pg. 748-754 and 17 A-F, JA Pg. 755-780; R.124: id., Exhibit 18, JA Pg. 781 and 18A-F, JA Pg. 782-796.[21]

Champion claims Appellant did not receive a "promotion" when she became Safety Manager subsequent to serving as Safety Coordinator, because there was no grade change. (R.144: Makofsky depo., Pg. 126-127, JA Pg. 1932-1933). However, Defendant's independent compensation expert, Ms. Bentson, believed Appellant was PROMOTED to Safety Manager from Safety Coordinator, (R.128: Bentson depo., Pg. 220-222, JA Pg. 1217-1219).[22]

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[21]The only time an EAF indicated a change in title only was when the position change was a lateral one, without a promotion for a grade increase or a salary increase resulting from increased job responsibilities. (R.92: Apx. to Def's Mot. for S.J., Ex. 99, JA Pg. 471).

[22]A cover letter was sent to Ms. Bentson by defense counsel, outlining certain facts for Ms. Bentson to assume as part of her rendering an expert opinion. In that letter of October 14, 1996 (R.124: id., Ex. 39, JA Pg. 1025-1026), defense counsel represented to Ms. Bentson "After several promotions that are not at issue in this case, PLAINTIFF WAS PROMOTED IN OCTOBER OF 1988 TO THE POSITION OF SAFETY MANAGER." (Emphasis added)

(vi) Champion claims that there were legitimate business reasons for the fact that Appellant received no salary increase for added responsibilities, even within the salary range for Grade 12, and no promotional salary increase when, in 1994, her title was changed to Loss Prevention Manager and her grade was raised from 12 to 13.

As the record demonstrates, male employees who were burdened with significant added responsibilities, even without a grade increase, received substantial salary raises in recognition thereof. (R.124: Ex. 17, JA Pg. 746-780 and 17A-G, JA Pg. 753-761 and 17-R, JA Pg. 751 and 772 John Stuckey and Ted Robison, respectively; also, see Pg. 22, footnote 16, supra).

Given the evidence of continued and substantial added responsibilities to Appellant's Safety Manager position, after she assumed it, from 1988 through 1991, we fail to see what legitimate business reason could exist for Mr. Makofsky to fail

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This admission by defense counsel is supported by considerable evidence as detailed herein.

to even inform, recommend, if not effectuate and authorize, such an increase for Appellant (at least through August, 1993, when he ceased to be her immediate supervisor.) In fact, **APPELLANT COULD HAVE RECEIVED A SALARY COMPARABLE TO HER PEERS, EVEN WITHIN THE SALARY RANGE FOR GRADE 12**. Notwithstanding her high performance ratings and Annual Salary Increases from 1989 on, Plaintiff never reached even the upper third of the Grade 12 salary range and, in 1994, was put in the lower third of the Grade 13 salary range. (R.124: id., Ex. 33, JA Pg. 1009, within 1001-1009; Ex. 45, JA Pg. 1043-1049 and Ex. 17.1, JA Pg. 1001-1009, 1043-1049 & 748). Her immediate supervisors always had the option of increasing her actual salary within Grade 12[23]--- in recognition of an added facility and significantly increased responsibility --- without any grade change. THE COMPENSATION DEPARTMENT HAD NOTHING TO DO WITH DETERMINING AN EMPLOYEE'S MOVEMENT UP A SALARY RANGE WITHIN A GRADE. THIS WAS, IN THE FIRST INSTANCE, THE DISCRETIONARY FUNCTION OF THE

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[23]The maximums in the Grade 12 salary ranges were: 1990-$48,700; 1991-$48,800; 1992-$50,800; 1993-$52,600; 1994-$53,900. (R.124: id., Ex. 45, JA Pg. 1043-1049).

IMMEDIATE SUPERVISOR. (R.148: Moty depo., Pg. 463-464, JA Pg. 2099-2100).

Additionally, Appellant's title was changed AND HER GRADE RAISED TO 13 in May, 1994. (R.92: id., Ex. 74, JA Pg. 307-310). It was Champion's policy to accord a promotional increase when a salary grade was increased. Male employees who received a salary grade increase were considered "promoted" and given substantial promotional raises. (R.124: id., Ex. 17 and 17.1 and 17 A-Z, JA Pg. 746-780). However, Appellant did not receive a promotional salary increase. This is not only another example of disparate treatment, but also an example of retaliation. In fact, since Appellant's job description in 1994 contained the same original and added responsibilities she had in 1990, she should have had at minimum a Grade 13 approximately four years earlier than 1994.

IV. **RETALIATION**.

As previously discussed, there was no legitimate business reason for Appellant not to have received a promotional pay increase in May, 1994, when her grade was increased from 12 to 13. (Incidentally, her title was also changed from Safety Manager to Loss Prevention Manager.) While this is adverse action consistent with disparate

treatment motivated by gender bias, the evidence also indicates it was motivated by retaliatory intent. As previously indicated, in March, 1994, only two months earlier, Appellant had complained in writing about gender discrimination and indicated she might file a lawsuit. Mr. Gidez, (VP General Manager, DairyPak), received Appellant's letter of March 4, 1994 shortly thereafter. (R.136: Gidez depo., Pg. 358-359, JA Pg. 1657-1658; R.124: id., Ex. 30, JA Pg. 930-932). This evidence supports a reasonable inference that the disparate treatment of Appellant in 1994 was not only discriminatory, but also retaliatory. Again, we say this because there is no perceivable legitimate reason (except the obvious one) as to why Appellant --- at this point in time --- was denied a promotional raise consistent with Champion's policy that a grade increase signifies a promotion.

With respect to constructive retaliatory discharge, it should be noted that a Safety Loss Prevention supervisor (or an Environmental one), with multi-facility responsibilities, always remained at a facility, even if attached to Divisional Headquarters. (R.118: Keyer. depo., Pg. 2328-2330, JA Pg. 1889-1891). That is because the nature of that kind of job requires a presence at a facility. Appellant was the only Safety Loss Prevention/Environmental supervisor or manager whose

job was detached from a facility. Every mill Loss Prevention and Environmental supervisor (all males) were located at a specific operational facility. Mr. Striley, (Manager, Solid Waste, Forest Products Division) who had multi-facility responsibilities (as did Appellant), officed at the Hamilton-Knightsbridge facility. But according to Champion, Appellant's position, also a Loss Prevention/Environmental Supervisory position, had to be moved to Headquarters in Stamford. That decision was made in August/September 1994.

While Champion claims this was a legitimate business decision, we contend otherwise.

Moreover, Appellant was essentially told by her then immediate supervisor, John Stuckey, that she was not wanted in Stamford and that a way would be found to get rid of her. (R.116: Keyer. depo., Pg. 221, JA Pg. 1632; R.118, id., Pg. 2333, JA Pg. 1893). During the discussions concerning Appellant's possible move to Stamford, Appellant, in writing, expressed her fear that she was on thin ice and looking at a termination. (R.124: id., Ex. 47, JA Pg. 1064-1068). As early as March, 1994, Mr. Makofsky told Appellant that she would suffer serious consequences for having written her letter of March 4, 1994. (R.111: Keyer. depo., Pg. 981, JA Pg. 1695).

Appellant was well aware of Mr. Gidez' vindictive nature. When a conference call was made to announce the closing of the Olmsted Falls office, in response to a comment Appellant made, Mr. Gidez exploded with a mean-spirited response: "Why don't we blow up the office in Stamford and move everyone out to the locations." (R.154: Yuncker depo., Pg. 50-52, JA Pg. 2366-2368).[24] Mr. Oberstadt told Appellant she was not wanted at Stamford. (R.118: Keyer. depo., Pg. 2332-2333, JA Pg. 1892-1893).[25]

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[24]Mr. MacMillan (VP Div. Manager, DairyPak) testified that Mr. Gidez was "unfair, unjust, untrustworthy and arbitrary." (R.141: id., Pg. 24-25, JA Pg. 1907-1908). Given Appellant's letter complaining of gender discrimination, MacMillan testified "it's possible that he would make a decision to retaliate." (R.141: id., Pg. 148-152, JA Pg. 1912-1916). In another instance, referring to H.R. Manager, Chuck Grotsky, Mr. Gidez asked Mr. MacMillan "when are you going to fire that fat shit." (R.141: id., Pg. 26).

[25]Ms. Palos testified that Appellant's gender discrimination claim was the "direct cause" of moving Appellant's position to Stamford; she noted Mr. Gidez' "reputation for being vindictive" and that he had previously stated "that when he was unhappy with someone (as she knew he was about Gigi's gender complaints) he would make sure that he would eliminate them...(Gigi's gender complaints) was a similar situation." (R.152: Palos depo., Pg. 625-632, JA Pg. 2269-2275).

SUMMARY OF ARGUMENT

Our Argument is premised upon the assumption that the ultimate issue in this case is whether or not adverse employment actions were taken against Appellant by Champion because of her gender, in violation of O.R.C. 4112.02(A), (I) and (J). The ultimate issue on summary judgment is whether or not, viewing the evidence in a light most favorable to Appellant, a jury could reasonably conclude that Champion took adverse actions against Appellant connected with her employment by virtue of her gender. We mention the obvious first and foremost. The various evidentiary categories, The McDonnell-Douglas test, the shifting burdens, the "pretext plus", "pretext only" and "permissive pretext" standards, the "similarly situated" consideration --- are not ends unto themselves, but rather means of analysis of the evidence to determine whether or not triable issues of material fact exist with respect to the ultimate issue. Because these "means" can become "ends" unto themselves, legal scholars have become critical of McDonnell-Douglas: Stephen W. Smith, "Title VII's National Anthem: Is there a prima facie case for the prima facie case?" A Labor Lawyer, Vol. 12 and Number 3 (Winter/Spring 1997) (R.124: id., Ex. 57, JA Pg. 1100-1128, at JA Pg. 1101); Kenneth R.

Davis, The Stumbling Three-Step, Burden Shifting Approach in Employment Discrimination Cases, 61 Brooklyn L.Rev. 703, cited in Kline v. Tennessee Valley Authority, unreported, infra. (Attached at B-12).

This is a gender pay discrimination case, along with retaliation, including constructive retaliatory discharge. Under the Ohio Supreme Court decision in Mauzy, infra, Appellant has produced direct evidence of gender discriminatory intent and motivation, primarily on the part of Appellant's immediate supervisor, Mr. Makofsky, causally related to the adverse employment actions taken against her. We see McDonnell-Douglas (under Ohio law, and under Ohio's interpretation of Barnes, infra) as applicable in Ohio only in the absence of any evidence of discriminatory intent, whether direct, circumstantial or statistical.

We further believe that this Court of Appeals is required to apply Ohio's interpretation of federal authority with respect to an Ohio statute.

Under McDonnell-Douglas, if applicable, Appellant's evidence establishes a prima facie case of disparate treatment on the basis of her gender. We see the Mitchell decision, infra, as applicable to cases (such as Mitchell) where the employee has produced no evidence of discriminatory motive

or intent. We also see Mitchell as relating to a performance-related termination, involving employer discipline, related to misconduct. In such a case, the definition of "similarly situated" based upon comparable job duties and like supervisors is understandable.

However, in our case, no claim of Appellant's job performance is being advanced by Champion in support of its claimed legitimate business reasons. Nor is this a performance-related discharge case. Therefore, disparate treatment must be viewed in light of the nature of Appellant's claims, some of which do not relate to specific job content.

With respect to pretext, Champion's claimed legitimate business reasons are factually challenged as both untrue and cover-ups for the true gender discriminatory and retaliatory motivations of Champion.

ARGUMENT

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND IN

ENTERING JUDGMENT THEREUPON IN FAVOR OF APPELLEE

Standard for Review

In reviewing the District Court's Order granting Champion's Motion for Summary Judgment, this Court of Appeals must determine if there is "no genuine issue as to any material fact." (Federal Rules of Civil Procedure, R. 56(c)). The opposing party is obligated to produce evidence supporting the elements of her claim. Celotex v. Catrett, 477 U.S. 317, 377 (1986). By the same token, the evidence must be viewed "in the light most favorable to the party opposing the Motion." U.S. v. Diebold, Inc., 369 U.S. 654, 655 (1962); U.S. v. Hodges X-Ray, Inc., 759 F.2d 557, 562 (6th Cir. 1985); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 578-88 (1986); Ali v. Chelsea Catering, 910 F. Supp. 338, 342 (6th Cir. 1995).

This is a diversity jurisdiction case. Appellant's claims are brought pursuant to Ohio Revised Code, Chapter 4112. Therefore, this Court of Appeals is obligated to apply Ohio law. The Ohio Supreme Court has held that federal authority

is "generally applicable" and "relevant" to cases involving O.R.C. Chapter 4112. Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civil Rights Comm'n (1981), 66 Ohio St. 2d 192; Little Forest Med. Ctr. v. Ohio C.R.C. (1981), 61 Ohio St. 3d 607. However, Ohio is not obligated to apply federal authority to the interpretation of Ohio's statutes. (Ohio Civil Rights Comm'n v. Ingram (1994), 69 Ohio St. 2d 89, dissenting opinion of Justice Wright at 97). Indeed, in a diversity jurisdiction action, it is the obligation of the federal courts to look to and apply state authority to the extent it differs from federal interpretations of Title VII or other related federal statutes.[26] We believe this consideration should be noted, in particular, regarding the Ohio decisions cited hereafter of Mauzy and Sutherland, infra.

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[26]A good example of the kind of appropriate restraint and deference which federal courts should accord to state law is demonstrated by the pending action of Michael J. Genaro, Sr., et al. v. Central Transport, Inc., et al., Ohio Supreme Court Case Number 97-1595. (Attached as B-11). Although this Sixth Circuit Court of Appeals has determined that there is no individual liability under Title VII (and the Kentucky Civil Rights statute) (Wathen v. General Electric Co., 115 F. 3d 400 (6th Cir. 1997)), the question certified to the Ohio Supreme Court by Judge Nugent seeks Ohio's interpretation on that issue pursuant to O.R.C. §4112.01.

A. DIRECT AND CIRCUMSTANTIAL EVIDENCE OF GENDER BIAS.

Three broad categories of evidence have been identified in employment cases: direct evidence, circumstantial evidence and statistical evidence. It appears that Ohio does not limit proof of discrimination to any one type of evidence. Mauzy v. Kelly Services, Inc. (1996), 75 Ohio St. 3d 578. In Mauzy, the Ohio Supreme Court clearly stated in reference to Barnes v. GenCorp., Inc., 896 F.2d 1457, 1464 (6th Cir., 1990):

> "The importance of the McDonnell-Douglas 'test' is its discussion of the elements a plaintiff must prove to establish a prima facie case of discrimination ABSENT DIRECT, CIRCUMSTANTIAL OR STATISTICAL EVIDENCE OF DISCRIMINATION." (Emphasis added by the Court) Mauzy at 583.

Champion argues that Appellant has no "direct evidence" in this case. However, in Mauzy, the Ohio Supreme Court, citing Krohmescher v. Kroger Co. (1991), 61 Ohio St.

3d 501, DEFINED DIRECT EVIDENCE as "evidence which refers to the METHOD of proof and not the TYPE of evidence." (Emphasis the Court's, Mauzy at 583). In Mauzy, the Ohio Supreme Court held that the McDonnell-Douglas standard is an indirect method of proof involving the process of elimination, but is not the only method by which an inference of discrimination may be created. Mauzy at 584. As indicated in Mauzy, direct evidence "means that the Plaintiff may establish a prima facie case directly by presenting evidence, OF ANY NATURE, to show that the employer more likely than not was motivated by discriminatory animus." Id. at 586-87 (Emphasis added). Indeed, Mauzy further elaborated that "evidence of discriminatory intent is nothing more than proof of discriminatory thought." Id., at 587.

The most recent pronouncement of the Ohio Supreme Court with regard to the direct method of proof is Byrnes v. LCI Communication Holdings Co. (1996), 77 Ohio St. 3d 125. As Justice Resnick pointed out in her dissenting opinion, this case does not stand as a pronouncement of the Ohio Supreme Court because the majority opinion is only a plurality one. In fact, the dissenting opinion of Justice Resnick, reaffirming Mauzy, was joined by Justice Pfeifer. Justice Douglas concurred in the judgment; he indicated that he

continued to subscribe to Mauzy; Justice Sweeney concurred with Justice Douglas in that respect. Therefore, the current definitive evidentiary standard of proof today in Ohio is set forth in the Mauzy decision. *See also* Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556 (11th Cir. 1983), cert. denied, 467 U.S. 1204 (1984) ("McDonnell-Douglas is not intended to be a Procrustean bed within which all disparate treatment cases must be forced to lie.")

Federal courts have taken the same view as Mauzy. For example, in Jatoi v. Hurst-Euless-Bedford Hospital Authority, 807 F.2d 1214 (5th Cir. 1987) the court stated:

> "While proof of all four of the McDonnell Douglas criteria will establish a circumstantial prima facie case, such proof is not the exclusive means of establishing a plaintiff's preliminary burdens...If a plaintiff cannot establish some or all of the McDonnell-Douglas steps, the district court must examine all the evidence that has been adduced for other indicia of racial discrimination relating to his discharge and determine whether it is more likely than not that the employer's actions were based on illegal

discriminatory criteria. Id." Jatoi, at 1219.

The Sixth Circuit, in Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1246, (6th Cir. 1995),[27] essentially held that an inference of discrimination may be drawn from expressions of discriminatory thought or stereotyping. Even though the slurs in Talley were not specifically directed to or about the Plaintiff-employee, such discriminatory slurs constituted "direct evidence" sufficient, in and of itself, to create a triable question of fact for a jury. See also Troupe v. May Dept. Stores Co., 20 F.3d 734 (7th Cir. 1994), which follows the reasoning in Mauzy, supra.

Perhaps the best statement of the relationship of

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[27]Talley, supra, adopted the Eleventh Circuit's reasoning in Lee v. Russell County Bd. of Educ., 684 F.2d 769, 774 (11th Cir. 1982) and Miles v. MNC Corp., 750 F.2d 867, 875-76 (11th Cir. 1985). As stated in Talley at 1249:

> "In Miles, the court held that racial slurs made by a manager were direct evidence of discrimination SUFFICIENT TO GET THE PLAINTIFF'S CASE TO THE JURY. Miles, 750 F.2d at 870" (Emphasis added).

McDonnell-Douglas to proof of discriminatory intent/motivation is found in the decision of Barnes v. GenCorp Inc., 896 F.2d 1457 (6th Cir., 1990):

> "We have stated that the McDonnell Douglas test is not to be applied mechanically, instead opting for a case-by-case approach that focuses on whether age was in fact a determining factor in the employment decision. See Merkel v. Scovill, Inc., 787 F.2d 174, 177 (6th Cir.) cert. denied, 479 U.S. 990, 107 S.Ct. 585, 93 L.Ed.2d 587 (1986); Blackwell v. Sun Elec. Corp., 696 F.2d 1176, 1179 (6th Cir. 1983) (holding that a plaintiff who could not demonstrate every element of the McDonnell-Douglas test could nonetheless demonstrate a prima facie case); Ackerman, 670 F.2d at 70." (Barnes at 1465, fn. 9)

The District Court held that the discriminatory attitudes of Mr. Makofsky were neither connected to Appellant nor to the determination of her salary or salary grade when she became Safety Manager. (R.164:

Memorandum of Opinion, Pg. 5-6., JA Pg. 32-33, within 28-42). The District Court failed to consider the fact that the gender-biased attitude of Mr. Makofsky (that women did not belong in management) was entirely consistent with his adverse actions against Appellant, resulting in her nonmanagerial salary grade, her inequitably depressed pay and her nonparticipation in management bonuses. The fact that the expression of his views was directed to Mr. Anderson and not directly to Appellant is irrelevant. "Evidence of discriminatory intent is nothing more than proof of discriminatory thought."Mauzy, supra, at 587. Mr. Makofsky held these gender biased views at the time when Appellant was the only female departmental manager whom he directly supervised. To hold, as a matter of law, that a jury could not causally connect his views with the adverse employment actions he took against Appellant constitutes a failure to accurately examine the facts. Only in a technical sense does this proof fall short of the strict definition of "direct evidence." Lautner v. American Tel. & Tel. Co., 106 F. 3d 401 (6th Cir. 1997); Terbovitz v. Fiscal Court of Adair County, Kentucky, 825 F.2d 111; 114-115 (6th Cir. 1987). Had Mr. Makofsky stated to Mr. Anderson "women had no business in management in a company," "and that includes Gigi

Keyerleber" then, technically, this would be "direct evidence" rendering the McDonnell-Douglas approach irrelevant. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). In a meaningful sense, to whom other than Appellant would Mr. Makofsky's view apply? Mr. Makofsky did not indicate that women should not be in management, "except for Ms. Keyerleber, to whom my attitude does not apply!" Even if Mr. Makofsky's gender-biased view is regarded as circumstantial evidence, it doesn't take much of an "inference" to conclude that Appellant was included in the application of his gender bias. Indeed, the evidence is indisputable that Mr. Makofsky actually did apply his bias to Appellant. When Appellant properly complained to Mr. Makofsky about Mr. Anderson excluding her from business meetings involving other management employees BECAUSE SHE WAS A WOMAN, Mr. Makofsky treated her concerns with bemused indifference. Again, if this is regarded as circumstantial evidence, it is not much of an "inference" to conclude that Mr. Makofsky's views about women in management were applied to Appellant. With respect to Mr. Makofsky's adverse actions regarding Appellant's salary, salary grade and management training, there is unquestionably a permissible "inference" that Mr. Makofsky was motivated by his openly expressed gender

bias. The District Court's application of McDonnell-Douglas to this factual record as a basis for granting summary judgment against Appellant is, in our view: (1) contrary to Ohio's definition of direct evidence in Mauzy, supra, and (2) a violation of Appellant's right to a civil jury pursuant to the Seventh Amendment to the United States Constitution (Attached as B-6) as well as her same right pursuant to the Ohio Constitution, Art. VIII, Sections 7 and 8. (Attached as B-7).

The McDonnell-Douglas paradigm should not apply to an evidentiary record like this one given our proof of discriminatory motive and intent, causally related to the adverse actions taken against Appellant. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989); Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); Terbovitz, supra; Blalock v. Metals Trades, Inc., 775 F.2d 703, 707 (6th Cir. 1985); and Bell, supra.

The issue in this case is whether or not the adverse actions taken against Appellant in her employment were primarily the result of gender discrimination. McDonnell-Douglas was not designed as a convenient mechanism for throwing Plaintiffs out of court where the evidence of

discrimination is circumstantial rather than direct.[28] The McDonnell-Douglas analysis is designed as a method to view the evidentiary record where there is no evidence of discriminatory motive or intent. For example, in Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992), the Plaintiff had no evidence of discriminatory intent. Under those circumstances the application of McDonnell-Douglas was appropriate.[29]

Nevertheless, the evidence in this record supports all of the elements of the McDonnell-Douglas test. With respect to salary and salary grade issues, Appellant has satisfied the requirement of "similarly situated." With respect to termination, Appellant has satisfied the "replacement"

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[28]One might examine what we consider to be the illogical "preference" for direct as opposed to circumstantial evidence. Per the old adage, "if you really want to know what someone intends, go by what s/he does, not what s/he says."

[29]See Stephen W. Smith, "Title VII's National Anthem: Is there prima facie case for the prima facie case? A Labor Lawyer, Vol. 12 Number 3 (Winter/Spring 1997). This is an outstanding current article demonstrating the lack of utility of McDonnell Douglas and the judicial modifications to its application. The author asks: "but does the McDonnell-Douglas three-step accomplish a useful purpose for anyone other than publishing companies?" (R.124: id., Ex. 57, at Pg. 371, JA Pg. 1101, within 1100-1128).

requirement in that it is undisputed that she was replaced by a male, Bruce Kummerfield.

SIMILARLY SITUATED

In order to determine whether Appellant was similarly situated to other male employees, it is critical to identify the adverse actions she claims as being the result of gender bias. Neither her conduct nor her performance is at issue in this case. Moreover, there is evidence of causally related gender bias. These facts distinguish Appellant's case from Mitchell, supra, which treats "similarly situated" strictly as a function of comparative job responsibilities. While job content may be one possible basis to examine similarly situated, it is not the only one. The District Court only examined comparative job duties and found the duties of Appellant's "peers" and Loss Prevention Supervisor/Environmental Managers to be dissimilar as a matter of law. In fact, WITH RESPECT TO THE DISPARATE TREATMENT CLAIMED BY APPELLANT IN THIS CASE, she is in many respects not only similarly situated, but virtually identically situated to other male employees:

1. Viewing our evidence in its most favorable light, Appellant had a managerial position. Male employees with

managerial positions had salary grades above 12. Grade 12 for Safety and Loss Prevention employees, PER CHAMPION'S OWN BUSINESS DETERMINATION, was a grade for a nonmanagerial position. Appellant was identically situated to males with managerial positions, such as departmental managers and Loss Prevention/Environmental supervisors and managers. These males invariably had salary grades above 12. Therefore, in this respect, Appellant was disparately treated compared to other males with like managerial positions.[30]

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[30]One question which occurs to us is the necessity of "similarly situated" with respect to the facts in this case. For example, if Appellant received an illegitimately low grade of 12 because her supervisor, Mr. Makofsky, took steps to bring about this adverse result motivated by his personal gender-bias, why should it matter (as a matter of law per McDonnell-Douglas) that Appellant was treated in a negative disparate manner compared to males? If the evidence demonstrates that SHE was intentionally discriminated against by her supervisor, whose gender prejudice is causally related to the adverse actions taken by him, why isn't this proof, in and of itself,

2. Males who had significant responsibilities added to their positions received substantial increases in recognition thereof. Notwithstanding Appellant's major added responsibilities to her Safety Manager position, she received no similar salary increase recognition from the time she assumed her Safety Manager position until her employment ended at Champion.

3. Males who assumed or held positions with increased salary grades received substantial promotional salary increases. In 1994, Appellant's position was retitled and evaluated as a Grade 13. Nevertheless, she received no promotional raise.

4. Males who were promoted to

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sufficient to establish, at a minimum, a prima facie case? Can the law possibly be that if the evidence of discrimination is circumstantial (no matter how strong) as opposed to direct (no matter how weak), a female Plaintiff must demonstrate in all cases that she was similarly situated by specific job duties to males who report to the same supervisor to avoid being thrown out of Court?

already established or newly created positions with higher grades received substantial promotional salary increases. The evidence demonstrates that Appellant was promoted in 1988, when she assumed the newly created position of Safety Manager. (The evidence demonstrates that but for Mr. Makofsky's gender-biased intervention, Appellant should and would have had a salary grade increase, not just a position title name change). Unlike similarly situated promoted males, Appellant received no promotional salary increase.

5. According to Mr. Ray, Appellant's Safety Manager position entitled her to a salary grade and salary in line with what he himself considered her male peers to be. If Appellant's immediate supervisor thought and promised in 1988 that Appellant's Safety Manager position was similarly situated to the positions of her counterpart departmental managers, (Messrs. Fritsch and

Beck), why should the District Court mechanically substitute a job content comparison which was not relevant to the business judgment of the Champion supervisor who created and assessed this new position? (It will be recalled that Ms. Moty did not exercise either an informed or independent judgment of the salary grade for Appellant's Safety Manager position. It was the intercession of the gender-biased Mr. Makofsky which resulted in the determination of "change in position title only.")[31]

6. Why should the District Court

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[31]It is a basic legal tenet that a Plaintiff cannot substitute his or her business judgment in second-guessing a legitimate, nondiscriminatory judgment of the employer; just because the employer's judgment is incorrect does not automatically render it illegitimate. If Plaintiffs must properly observe this limitation, why shouldn't a trial court? If there is evidence indicating a business judgment by the employer that certain employees are considered similarly situated with respect to organizational level of responsibilities, salary grade and salary, why should a District Judge take it upon herself to second-guess or disregard THAT exercise of business judgment?

substitute a mechanical job content analysis, when Charles Gerber's factually grounded and experienced opinion was that Appellant was similarly situated to Mr. Oberstadt, (R.137: Gerber depo., Pg. 131-150, JA Pg. 1353-1372; R.137: Gerber depo., Ex. 10, JA Pg. 1377-1383, Ex. 14, JA Pg. 1412-1424 and 15, JA Pg. 1425-1447) a Grade 15 Corporate Loss Prevention Manager -- or for Mr. Clem, (VP of Environmental Affairs, Corporate), whose expressed opinion was that Appellant was similarly situated to Dave Striley, Grade 17, Manager, Solid Waste for the Forest (Wood) Product Division (R.137: Gerber depo., Pg. 154-155, JA Pg. 1373-1374) -- - or for Ms. Merritt's knowledgeable view that Appellant was similarly situated to Loss Prevention/Environmental Supervisors at paper mills, a view also shared by Mr. Gerber? (R.145: Merritt depo., Pg. 22-31, JA Pg. 1996-2005; R.145: id., Pg. 42-45, JA Pg. 2009-2012, and R.145: id., Pg.

316, JA Pg. 2033).

7. There is substantial evidence that Appellant's job functions and level of responsibility were similarly situated to Loss Prevention/Environmental supervisors and managers at paper mills. (R.117: Keyer. depo., Pg. 1492-1548, JA Pg. 1757-1813; R.124: id., Ex. 27, [27A & 27B], JA Pg. 908-925; R.131: Clem depo., Pg. 29-47, JA Pg. 1244-1262; R.124: id., Ex. 16; Ex. 17 [17.1 & 17A-17Z]; Ex. 20; Ex. 44; Ex. 46, JA Pg. 745, 746-780; 844-897, 1038-1042, 1050-1060; R.137: Gerber depo., Pg. 93-130, JA Pg. 1315-1372 and Ex. 12 & 13, JA Pg. 1377-1383 & 1386-1406; R.138: Gerber depo., Pg. 270-271 JA Pg.1450-1451 and Pg. 276-277, JA Pg. 1452-1453). Even if the District Court believed the evidence was otherwise as a matter of law, it does not follow that Appellant failed to establish that she was "similarly situated" in numerous other respects.

A pertinent treatment of "similarly situated" is Sutherland v. Nationwide Gen. Ins. Co., (1994), 96 Ohio App. 3d 793. There the court specifically used the "director level" as the comparable, without reference to job responsibility differences among directors. The Sutherland approach is Champion's approach. Champion salary grades are a function of comparative levels of responsibility. For example, the EPERR for the position "Manager Solid Waste Programs Corporate" states:

> "The Managers Air Programs, Solid Waste Programs, and Water Programs all function at comparable levels and type of responsibilities. The only difference amongst these positions are areas of concentration. LIKE GRADES SEEM APPROPRIATE FOR THESE POSITIONS." (Emphasis added). (R.147: Moty depo., Ex. 28, and in particular therein, Bates D6974 and D6977, JA Pg. 2058 & 2061, within 2057-2067).

It should be noted that the higher up a position is in management, the more likely the responsibilities will be unique

(and the less likely they will be identical or nearly identical to those of another employee). The strict application of direct evidence to upper management females runs the risk of thwarting Ohio's legislative intent underlying Chapter 4112. Direct evidence, strictly speaking (i.e., requiring no inference to establish discriminatory intent and causal relationship) is rarely available. Thus, most upper management females will be remitted to the McDonnell-Douglas paradigm. If Mitchell, supra, is literally required (i.e., identical or nearly identical job responsibilities) to establish a prima facie case under McDonnell-Douglas of discriminatory disparate treatment, then upper management female employees will be precluded from relief simply because their evidence, however persuasive, was "circumstantial" instead of "direct." Chapter 4112 was not intended to be applied in this manner. Upper management female employees were not intended to be precluded from relief unless they can prove discrimination with direct evidence. This is why we believe the Talley analysis is applicable to this case. Its essential holding is that circumstantial evidence of discriminatory bias can establish a prima facie case in the absence of Mitchell-type similarly situated proof.

There is no technical distinction between liability under

the Equal Pay Act and liability under Title VII. See Meldrum v. RPM, Inc., No. 1:93-CV-756, 1994 U.S. Dist. LEXIS 10493, at *29 (S.D. Mich. June 6, 1994). In fact, the Sixth Circuit concluded in the case of Accord Korte v. Diemer, 909 F.2d 954, 959 (6th Cir. 1990) that a distinction drawn between the Equal Pay Act and Title VII is overly technical and a finding of "sex discrimination and compensation" under one Act is tantamount to a finding of "pay discrimination on the basis of sex" under the other. Accordingly, and despite the fact that Mitchell, supra, was not even cited in Meldrum, both Meldrum and Accord suggest that this Court should consider cases under the Equal Pay Act for purposes of determining whether a particular Plaintiff is similarly situated in determining if Plaintiff has established a prima facie case.

In Meldrum, as in the case at bar, the functions of the Plaintiff were the same as others who were similarly situated, but not identical. In Meldrum, the employer claimed additional responsibilities for the male counterpart, whereas in this case, Appellant claims that she had additional responsibilities compared to her male counterparts. Nevertheless, the Court noted that the jobs that were being compared need not be identical to fall under the auspices of the Equal Pay Act. Indeed, "Plaintiff need only demonstrate

`substantial equality of skill, effort, responsibility and working conditions'" to satisfy her burden. Odomes v. New-u- Care, Inc., 653 F.2d 246, 250 (6th Cir. 1981). In other words, jobs need not be identical, just "substantially equal." Peters v. City of Shreveport, 818 F.2d 1148, 1153 (5th Cir. 1987) (holding "a showing of `equal work' requires only that the Plaintiff prove that the `skill, effort and responsibility' required in the performance of the jobs compared are substantially equal.") Clearly, Appellant's evidence herein meets this burden.

In the case at bar, there is no evidence that Appellant's job of Safety Manager required anything less than substantially equal "skill, effort and responsibility" than other Loss Prevention supervisors and/or environmental managers in the paper mills. In fact, Appellant's evidence demonstrates that her position required more skill.

PRETEXT

The most recent pronouncement of this Court of Appeals bearing upon the pretext issues in this case is Kline v. Tennessee Valley Authority, No. 94-6355, 1997 U.S. App. LEXIS 28527 (6th Cir. October 15, 1997) (Attached as B-12). In construing St. Mary's Honor Center v. Hicks (1993), 509 U.S. 502, this Court of Appeals has joined the numerous jurisdictions which have, per Hicks, adopted the "permissive

pretext only" standard. Under this method of review, (rejecting both the "pretext plus" and "pretext only" approaches), this Court of Appeals held in Kline, supra:

> "The import of the Hicks decision in this circuit is that once a plaintiff has disproved the reasons offered by the defendant, the factfinder is permitted to infer discrimination. A plaintiff does not need to introduce additional evidence of discrimination to prevail on the merits. Once a plaintiff establishes its prima facie case, this, along with disbelief of the defendant's proffered reasons for the negative employment action, will permit a finding of discrimination by the factfinder." (Attached as B-12, at B-19).

* * *

> As the Supreme Court's opinion in Hicks indicates, a factfinder is permitted to infer discrimination upon a determination that the reasons given by defendants are pretextual." (Attached as B-12,

at B-22-23).

This Court of Appeals further held that Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078 (6th Cir. 1994), "is limited to the case when the reasons offered by the Defendant are not factually challenged." (Kline, supra, Attached as B-12, at 18).

Such is certainly not the case here!

RETALIATION

The evidentiary standard for constructive discharge is whether a reasonable person would find the circumstances so intolerable that he/she would voluntarily resign. Murray v. Sears, Roebuck & Co., 722 F. Supp. 1500, 1506 (N.D. Ohio 1989); Scandinavian Health Spa, Inc. (1990), 64 Ohio App. 3d 480, 487. (The retaliatory promotional pay deprivation in 1994 is essentially a factual issue.)

It was made apparent to Appellant that because of her claims of gender discrimination, Champion did not want her as an employee. This is the reason Appellant gave for turning down the offer to relocate to Stamford --- that it would have been irresponsible of her to go there, under the circumstances. (R.124: id., Ex. 47, JA Pg. 1061, within 1061-1068).

In order to sustain a claim of retaliation, it is necessary

to establish that Appellant engaged in a protected activity, was subjected to adverse employment action and that a causal link exists between the two events. Yates v. Avco Corp., 819 F.2d 630, 638 (6th Cir. 1987).

The combination of relocating Appellant's position to Stamford (contrary to practice for Loss Prevention/Environmental supervisors, even with multi-facility responsibilities) AND threatening Appellant with termination if she relocated is rather powerful evidence of a "causal link."

CONCLUSION

For the reasons set forth herein, Appellant requests that this Court of Appeals reverse the District Court's Order entering judgment in favor of Appellee Champion, pursuant to the District Court's Order granting Champion's Motion for Summary Judgment, and that this action be remanded to the District Court for further proceedings on the merits.

Respectfully submitted,

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CASE NO. 97-3796

In the
United States Court of Appeals
For The Sixth Circuit

GERLINDE KEYERLEBER,
Plaintiff-Appellant,

FILED
JUN 12, 1998

v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO AT CLEVELAND

FINAL REPLY BRIEF OF THE APPELLANT

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ARGUMENT

I. SAFETY COORDINATOR VS. SAFETY MANAGER

Champion argues the following: from October 1, 1988 to the end of Appellant's employment on June 9, 1995, she never had a "new position" --- not when she became Safety Manager on October 1, 1988 and not when she became Loss Prevention Manager on July 1, 1994. (Champion's Brief, Pgs. 8 & 11). According to Champion, the move from Safety Coordinator to Safety Manager was a title change only, without any salary increase. (Id., at 11) According to Champion, the move from Safety Manager to Loss Prevention Manager in mid-1994 was also just a title change, even though Appellant's salary grade moved from 12 to 13. (Id., at 8) Champion claims that "Keyerleber's grade increase [in 1994], which arose from a re-evaluation that revealed a shift in external market data, did not qualify Keyerleber for a salary increase beyond her regularly scheduled increase." (Id. at 12).

According to Champion, the move from Safety Coordinator to Safety Manager in 1988 was not a "promotion" because her salary grade remained the same "nonmanagerial" grade of 12. But even in 1994, when her

salary grade moved to 13, this was not a "promotion," because this salary grade change was only a "re-evaluation" based on external market data. With respect to added responsibilities while Safety Manager, Champion argues that this is a typical "incremental development" over a six year period from 1989 to 1994, which was "certainly not unusual" for a Champion employee. (Champion's Opp. Br. Pg. 39). Inasmuch as Ms. Moty of Compensation determined that the increase in responsibilities did not justify a grade change, whether or not Appellant received a "promotion" is "a matter of semantics." (Champion's Brief, Pg. 6, fn. 6).

Thus, Champion claims legitimate nondiscriminatory business justification for the undisputed fact that from the date of her last promotion (to Safety Coordinator) in June, 1987 and continuing in 1988, 1989, 1990, 1991, 1992, 1993, 1994 and half of 1995, (when she left Champion), APPELLANT NEVER RECEIVED A NEW POSITION, A PROMOTION, OR A PROMOTIONAL SALARY RAISE OR INCREASE OF ANY KIND WHATSOEVER---an 8 year period covering almost a decade.[1]

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[1] As Appellee notes, Appellant received near maximum annual salary increases. She earned them according to established salary percentage increase matrices applicable to

Champion's professed justification has one major problem: the facts do not support it.

The position of Safety Manager never existed until Mr. Ray, Appellant's supervisor, created it in October, 1988. Based upon that which Mr. Ray told Appellant, this new position was, in Mr. Ray's words, a "promotion," not a "title change only." Mr. Ray told Appellant that the position carried with it a salary grade and salary commensurate with her "peers" (Appellant's Brief, Pg. 16, fn. 11), including Messrs. Fritsch (Graphic Arts Manager, Grade 15, salary $53,000) and Beck (Production Engineering Manager, Grade 16, salary $58,000).

The undisputed facts in this record substantiate Appellant's testimony that Safety Manager was a new managerial position with substantially expanded responsibilities compared to Appellant's previous position of Safety Coordinator.

---

all employees based upon her high performance ratings. None of this has anything whatsoever to do with the kind of large promotional salary increases immediately received by male employees for added responsibilities and/or position salary grade increases --- who, by the way, were also entitled to performance driven annual percentage increases and, where applicable, accelerated reviews.

Comparing the Safety Coordinator EPD (R.124: Ex. 28, JA Pg. 926-929) with the Safety Manager EPD (R.124: Ex. 9, JA Pg. 698-701), two things are immediately apparent: first, in the Safety Coordinator EPD, under " Supervision," the total number of employees directly or indirectly supervised is ZERO. (R.124: id., bates #D4136, JA Pg. 927). Under the same Section of the Safety Manager EPD, the total number of employees indirectly supervised is TWENTY[2] (R.124: id., Pg. 2, JA Pg. 699).

On the Safety Manager EPD, (R.124: Ex. 10, id., JA Pg. 704), among the listed essential requirements for the position are "management and administrative skills" and "general knowledge of environmental issues and compliances." On the Safety Coordinator EPD, under the same identical section, neither "management and administrative skills" nor "knowledge of environmental issues and compliances" is required. (R.124: id., Pg. 3, JA Pg. 928). In fact, neither of these items are even listed as "Desired."

There is considerable ADDITIONAL evidence that Safety Manager was a new, managerial position with much

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[2]Those employees whom Appellant supervised included the various DairyPak plant managers. (R.137: Gerber depo., Ex. 5, Pg. 2; R.138: id., Pg. 316-320).

greater authority and responsibility than Safety Coordinator.

A full exposition of the comparative job duties makes this compellingly clear:

1. Safety Coordinator involved assisting and providing guidance; Safety Manager involved directing management and assuring compliance. (R.117: Keyer. depo., Pgs. 1492-1493, JA Pg. 1757-1758; R.124: Exs. 9, JA Pg. 698-701, 10, JA Pg. 702-705 and 28 JA Pg. 926-929);

2. Safety Coordinator involved little, if any, interaction or reporting to plant and division managers. Safety Manager involved direct interaction with plant and division managers, including forwarding of copies of reports directly to them. (R.117; id., Pg. 1511, JA Pg. 1776);

3. Safety Manager involved industrial hygiene functions and direct, hands-on industrial hygiene monitoring at all facilities. Safety Coordinator had no responsibility for industrial hygiene monitoring. (R.117: id., Pg. 1512, JA Pg. 1777);

4. Safety Manager required writing and reviewing Emergency Response Procedures. No such activity was involved in the job of Safety Coordinator. (R.117: id., Pg. 1514, JA Pg. 1779);

5. The Safety Manager position included responsibilities for the Fire Protection Program, which included reviewing Fire Protection Audit Reports from outside insurers. The Safety Coordinator position did not involve these fire protection program responsibilities. (R.117: id., Pg. 1513, JA Pg. 1778).

6. The position of Safety Manager required directing management and insuring compliance with a number of environmental laws, including Resource Conservation & Recovery Act (RCRA); Hazardous & Solid Waste Amendments (HSWA); Hazardous Materials Transportation Act (HMTA); "Superfund" and its Amendments and Reauthorization Act (SARA); Safe Drinking Water Act (SDWA); and Toxic Substances Control Act (TSCA); (R.124: Ex. 16, JA Pg. 745) Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). (R.131: Clem depo., Pg. 29-47, JA Pg. 1244-1262). THE SAFETY COORDINATOR POSITION HAD NO ENVIRONMENTAL RESPONSIBILITIES OF ANY KIND WHATSOEVER. (R.117: id., Pg. 1492-1493 and 1515, JA Pg. 1757-1758 & 1780);

7. The Safety Manager position included putting in place in the plants safety incentive programs. This was not a duty in the position

of Safety Coordinator. (R.117: id., Pg. 1517, JA Pg. 1782);

8. The Safety Manager position included making safety recommendations in the plants with respect to capital projects. No such responsibility existed for the position of Safety Coordinator. (R.117: id., Pg. 1519, JA Pg. 1784);

9. The Safety Manager position included responsibility for the selection for purchase of safety equipment for the various plants. No such duty was part of the job of Safety Coordinator. (R.117: id., Pg. 1520, JA Pg. 1785);

10. The Safety Manager position included the responsibility for assuring FDA compliance (in that sanitary factors were involved with cartons that contained food products); no such responsibility was part of the duties of the Safety Coordinator position. (R.117: id., Pg. 1522, JA Pg. 1787);

11. The Safety Coordinator position involved merely review of existing safety programs; the Safety Manager position required not only review of existing programs, but also consulting and making recommendations with respect to new safety programs. (R.117: id., Pg. 1523, JA Pg. 1788);

12. The Safety Manager position required detailed safety analyses with respect to injury trends. Such a responsibility was not a part of the duties of the Safety Coordinator position. (R.117: id., Pg. 1525, JA Pg. 1790);

13. The position of Safety Manager required attendance at RCRA conferences as well as meetings for other environmental counterparts. As previously indicated, the Safety Coordinator position did not include any environmental responsibilities whatsoever. (R.117: id., Pg. 1525, JA Pg. 1790);

14. As part of the environmental responsibilities of the position of Safety Manager, regular involvement and dealings were required with various state EPA's, including Ohio, New Jersey, Texas, Iowa, Illinois and North Carolina. The Safety Coordinator position had no environmental responsibilities. (R.117: id., Pg. 1527-1528, JA Pg. 1792-1793);

15. The Safety Coordinator position, as previously indicated, had no responsibility for fire protection. The Safety Manager position required involvement with National Fire Projection Agencies. (R.117: id., Pg. 1530, JA Pg. 1795);

16. The Safety Coordinator position had no responsibility for emergency response. The Safety Manager position required working with local Emergency Response Associations. (R.117: id., Pgs. 1531-1532, JA Pg. 1796-1797);

17. The Safety Coordinator position included no duties with respect to DOT regulations. The Safety Manager position included duties along those lines and required communication and involvement with the Federal Department of Transportation. (R.117: id., Pg. 1535, JA Pg. 1800);

18. The Safety Manager position required the development of safety materials and safety manuals covering a number of concerns, such as Emergency Response, blood-born pathogen confined space entry training, personal protective equipment, and the OSHA Hazardous Communication Act. The Safety Coordinator position did not include any duties or responsibilities to develop safety manuals of any kind, nor did it involve the Haz-Com Program. (R.117: id., Pg. 1536-1537, JA Pg. 1801-1802);

19. The Safety Manager position included responsibilities for meeting with employees in task forces within plants at all locations. The Safety Coordinator position did not include such responsibilities or activities. (R.117: id.,

Pgs. 1537-1538, JA Pg. 1802-1803);

20. The Safety Coordinator position did include oral internal safety audits. The Safety Manager position, in addition, required formal documented written safety audits forwarded to plant and division managers and DairyPak Corporate managers. Safety Coordinator internal audits were mere communications, orally, on the spot, to internal plant personnel. (R.117: id., Pg. 1540, JA Pg. 1805);

21. The Safety Manager position required meetings with Union officials. Such meetings were not a part of the position of Safety Coordinator (R.117: id., Pg. 1540, JA Pg. 1805);

22. The Safety Coordinator position, as indicated on the EPD for Safety Coordinator, required monthly statistical reporting of the occurrence of accidents. The Safety Manager position required direct responsibility for each and every single accident, including a review of each accident report, appropriate calls, medical details and follow-up recommendations, not merely a general statistical reporting function on a monthly basis. (R.117: id., Pg. 1541, JA Pg. 1806);

23. The Safety Coordinator position had no responsibility whatsoever for workers'

compensation claims. The Safety Manager position included duties with respect to workers' compensation claims, including follow-up with compensation representatives and insurance companies (R.117: id.,Pg. 1542, JA Pg. 1807); this included duties for the handling of medical claims and the creation of preventive programs to avoid and/or reduce these claims. The Safety Coordinator position involved no responsibilities for medical claims. (R.117: id., Pg. 1544-1545, JA Pg.1809-1810).

24. The Safety Manager position required formal participation in legal proceedings and hearings involving safety and workers' compensation issues. The Safety Coordinator position did not involve any participation in legal proceedings or hearings. (R.117: id., Pg. 1542, JA Pg. 1807).

The District Court considered neither the above-quoted testimony nor the document, (which Appellant wrote out during her deposition upon a copy of the Safety Manager EPD of March 1, 1989 at the request of Champion's counsel), detailing her job duties as Safety Manager. (R.124: id., Ex. 27, JA Pg. 908-909).

The opinion of the District Court reveals that all of the evidence in the record concerning Appellant's responsibilities

in the position of Safety Manager was ignored, with the exception of one single document, the March 1, 1989 EPD for Safety Manager. (R.124, id., Ex. 9, JA Pg. 698-701). This EPD contained a vague, scant and inadequate description of Appellant's Safety Manager responsibilities and duties (R.148: Moty depo., Pg.483, JA Pg. 2101 and R.128: Bentson depo., Pg.116-118, JA Pg. 1212-1214 and 134, JA Pg. 1215):

> "Assist and direct Management in each location to organize and direct safety programs to insure compliance with OSHA standards. (40%)
>
> Direct and assure compliance with all RCRA activities through local coordinators. (40%)
>
> Determine need for safety meetings through accident/job analysis. (10%)
>
> Direct monthly statistical reporting to Corporate Loss Prevention. (5%)
>
> Attends safety & RCRA conferences, national, states, and local. (5%)" (R.124: Ex. 9, JA Pg. 698-701).

Inasmuch as this EPD was the ONLY document considered by the District Judge regarding Appellant's

responsibilities and duties as Safety Manager, it is no wonder that the District Court's Opinion demonstrates such disregard for the facts:

> "The Court further finds the positions of Loss Prevention Supervisor and Environmental Supervisor are not similarly situated to plaintiff's position. These positions entail significantly different responsibilities than were assigned to plaintiff...PLAINTIFF HAD NO LOSS PREVENTION RESPONSIBILITIES EXCEPT TO 'DIRECT MONTHLY STATISTICAL REPORTING TO CORPORATE LOSS PREVENTION.'" (Emphasis added) (R.164: Pg. 9-10, JA Pg. 36-37, within 28-42)...

> "Although plaintiff claims that her exempt position description form was inaccurate, SHE HAS NOT POINTED TO OTHER EVIDENCE OF HER JOB DUTIES." (Emphasis added) (R.164: Pg. 9, fn.6,, JA Pg. 36).

How could the District Court properly rule upon Champion's Summary Judgment Motion without even considering the extensive evidence in the record which was cited in Appellant's Summary Judgment Opposition?[3] How can Champion claim that Safety Manager was not a "new" position but rather only a title change from Safety Coordinator? How can Champion claim, including in the face of Mr. Ray's representations to Appellant, that Appellant's move from Safety Coordinator to Safety Manager was merely lateral and not promotional? How can Champion argue that the failure of Mr. Makofsky to monetarily recognize Appellant's added responsibilities while serving as Safety Manager (even within the salary range for salary grade 12), was anything other than disparate treatment when compared to Mr. Makofsky's treatment of male employees in like circumstances?[4] How can Champion contend that Appellant's

---

[3] See also R.124; id., Ex.27B, Pg.1-6, JA Pg.920-925 listing in detail all loss prevention functions for all Champion manufacturing facilities, including DairyPak.

[4] Contrary to Champion's claim that Appellant's Safety Manager position involved an "incremental development" of added responsibilities over a six year period from 1989 to

Safety Manager position was "nonmanagerial," requiring the nonmanagerial grade of 12, when the evidence overwhelmingly indicates otherwise?[5]

II. NEXUS

Champion argues that the evidence of Mr. Makofsky's "intervention" with the Compensation Department is "speculative." (Champion's Opp. Br., Pgs. 6 & 22). Champion further contends that "even if Makofsky ignored every allegedly sexist or discriminatory thing done or said by Anderson, there is no connection between this conduct and the evaluation of Keyerleber's salary grade by the female-managed Compensation Department or the setting of her salary by Makofsky and his supervisor. The necessary single nexus is

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1994, the record indicates that by 1990, when another DairyPak plant, Waynesville, was added to the six facilities for which Appellant was responsible, Appellant, as Safety Manager, was performing virtually all of the duties of Safety Manager as set forth hereinabove (R.118: Keyerleber depo., Pgs. 2152-2153, JA Pg. 1880-1881), and continued to do so until the end of her employment in 1995.

Grade 13 is the lowest "managerial" salary grade, according to Champion guidelines. Ms. Moty herself prepared the "Safety Engineering Grid for Business Unit-Nonmanagerial Positions" of November, 1989. (R.124: id., Ex. 31, bates #D6958, JA Pg. 933 & Bates # D6959, JA Pg. 939).

missing."[6] (Champion's Opp. Br. Pgs. 30-31).

There is substantial evidence indicating Mr. Makofsky's intervention and influence with Compensation, directly affecting Appellant's salary grade and salary as Safety Manager. While both Mr. Makofsky and Ms. Moty deny that influence or intervention, there is a substantial issue concerning the credibility of those denials.[7] It is highly improper in ruling on a summary judgment motion for a District Judge or a Court of Appeals to determine the credibility of the testimony of Mr. Makofsky and Ms. Moty. The "nexus" issue turns, in part, upon the credibility of these interested witnesses. See Killian v. Sears, Roebuck & Co.

[7] Of course, the failure of Mr. Makofsky, as Appellant's immediate supervisor, to recognize her greatly added responsibilities by a promotional raise within the same salary grade 12 is a prerogative solely of Mr. Makofsky and completely unconnected with the Compensation Department. (R.148: Moty depo., Ex. 40, Salary Administration Guidelines, Equity Adjustments, at Pg. 7 therein, Bates D3767, JA Pg. 2151, within 2143-2154).

Just because there is no sworn testimony that Appellant or somebody else overheard Mr. Makofsky tell Ms. Moty "keep her at a nonmanagerial grade 12" or simply because there is no document specifically so stating, does not mean that no evidence exists permitting a jury to reasonably conclude that there is such a "nexus."

(1995), 27 Ohio App. 3d 163, a unanimous decision of the Franklin County Court of Appeals in which the panel included, on assignment, two respected retired Justices of the Ohio Supreme Court. From our perspective, the discussion in Killilea hits the nail on the head:

> "Resolution of a motion for summary judgment does not include trying the credibility of witnesses. If an issue is raised on summary judgment, which manifestly turns on the credibility of the witness because his testimony must be believed in order to resolve the issue, AND THE SURROUNDING CIRCUMSTANCES PLACE THE CREDIBILITY OF THE WITNESS IN QUESTION : for example, where the potential for bias and interest is evident : then the matter should be resolved at trial, where the trier of facts has an opportunity to observe the demeanor of the witness. Duke v. Sanymetal Products Co. (1972), 31 Ohio App. 2d 78, at 83 [60 O.O. 2d 171]; McCormac, Ohio Civil Rules Practice (1984 Supp.) 66, Section 6.33...
>
> HOWEVER, CREDIBILITY CONCERNS CAN ALSO BE PRESENT WHERE, ON THE FACE OF EVIDENTIARY DOCUMENTATION SUPPORTING A MOTION FOR SUMMARY JUDGMENT, THE MOVING PARTY'S EVIDENCE ON A FACTUAL ISSUE APPEARS TO BE

UNCONTROVERTED. THIS WILL BE THE CASE WHERE, UNDER THE *CIRCUMSTANCES, CREDIBILITY MANIFESTLY IS CRITICAL TO A DETERMINATION THAT THERE IS NO GENUINE ISSUE AS TO THE EXISTENCE OF THAT FACT.*" (Emphasis added at pp. 167-168).

Killilea has been uniformly followed by numerous appellate courts throughout the State of Ohio.[5]

The evidence in this record not only brings into question the credibility of these assertions of Ms. Moty and Mr. Makofsky, but also affirmatively indicates the existence of such a "nexus." We begin by noting what evidence of "nexus"

[5]Manley v. Ruffin Club Mozambique, Inc. (1996), 111 Ohio App. 3d 260 (Allen Cty.); McGee v. Goodyear Atomic Corp. (1993), 103 Ohio App. 3d 236 (Pike Cty.); State v. Swortzheck (1993), 101 Ohio App. 3d 770 (Cuyahoga Cty.); Smith v. Ameriflora 1992, Inc. (1994), 98 Ohio App. 3d 179 (Franklin Cty.); Shaheen v. Boston Mills Ski Resort, Inc. (1992), 85 Ohio App. 3d 285 (Summit Cty.); Gray v. Jefferson Geriatric & Rehabilitation Ctr. (1991), 76 Ohio App. 3d 499 (Ashtabula Cty.); Halley v. Grant Trucking, Inc. (1990), 67 Ohio App. 3d 357 (Jackson Cty.); Felix v. Young, 536 F.2d 1126, 1134-1135 (6th Cir. 1976) ("...the fact that the movant's affidavits are uncontroverted does not necessarily mean that summary judgment should be granted --- the ultimate burden of proving the propriety of summary judgment remains on the moving party.")

does not exist. There is no proof that Mr. Makofsky ever specifically wrote or stated: "I am intervening to prevent Gigi Keyerleber from obtaining a managerial salary grade because she is a woman." Or, "I am refusing to accord her a promotional salary increase because she is a woman." Nor is there any evidence that Ms. Moty ever specifically stated or wrote: "I am evaluating her Safety Manager position with the same salary grade as her previous Safety Coordinator position because that's what Mr. Makofsky told or wants me to do." If this is the only way in which "nexus" can be established, most Plaintiff-employees might as well pack their bags and go home.

In May, 1989, Ms. Moty "evaluated" the Safety Manager position as a salary grade 12. (R.92: Ex. 67, JA Pg. 292-293). According to Champion, Moty's supposedly "independent" and "informed" evaluation insulates Makofsky, Anderson and every other Champion employee from any decision-making responsibility, no matter how much gender discriminatory animus they had. On this salary grade issue (but not the salary issue), Ms. Moty's grade evaluation is critical to Champion's defense: It determined the nonmanagerial grade 12; it justified the absence of a promotion; it justified the absence of any promotional salary

increase; and it supported Champion's characterization of Appellant's move from Safety Coordinator to Safety Manager as a "lateral one --- a change in title only." The May, 1989 salary grade determination of Ms. Moty sanitizes, immunizes and insulates everyone else at Champion from any possible liability as a decisionmaker. Voila! No nexus, no case.

However, there is conflicting evidence to the contrary, (direct and circumstantial), that Ms. Moty's evaluation was neither informed nor independent.

It is critical to notice that while Champion claims Ms. Moty's evaluation as its nondiscriminatory legitimate business justification, THERE IS NO LEGITIMATE BUSINESS REASON EVEN SO MUCH AS ARTICULATED BY CHAMPION EXPLAINING MR. MAKOFSKY'S INTERVENING CONDUCT. DESPITE CHAMPION'S UNSUBSTANTIATED PROTESTATIONS TO THE CONTRARY, THE CONNECTION BETWEEN MAKOFSKY'S CONDUCT AND MOTY'S 1989 EVALUATION IS MANIFEST:

1. The EAF is the critical initiating document submitted by the immediate supervisor to the Compensation

Department.[9] (R.92 id., Ex. 98, 1989 Salary Administration Guideline, Pg. 5, JA Pg. 468, within 464-470). Ms. Merritt testified to the FACT, based upon her personal knowledge, that these EAF's "were not changed...it was approved and returned to us generally as accepted or as recommended."[10]

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[9]"In the following situations, the completed EAF must be forwarded to Corporate Compensation for review and the obtaining of final approval:

*Any salary change actions outside the guidelines;

*Any action including a change or correction of grade;

*Those coded PR, PS, LT, JR, SA, SE, EM, ES, CI, DM, NA (See EAF Manual for explanation of codes).

Compensation will separate and distribute the EAF when final approval is received." (R.92: Ex. 98, 1989 Salary Administration Guidelines, Pg. 5, JA Pg. 468, within 464-470; R.145: Merritt depo., Pg. 254-257, JA. Pg. 2027-2030).

Ms. Carolyn Merritt was employed by Champion from October of 1988 to February of 1994. From October, 1988 to May, 1990, she held the position of Corporate Manager of Solid & Hazardous Waste. Her office was in Stamford, Connecticut, the corporate headquarters. In May of 1990, she transferred to the paper mill in Sheldon, Texas, where she was the EHS Manager until she left employment with Champion in February of 1994. As Corporate Manager of Solid & Hazardous Waste, Ms. Merritt was responsible to

(R.145: Merritt depo., Pg. 254-257, JA. Pg. 2027-2030). The Merritt testimony on the significance of the EAF was presented in our Opening Brief (Pg. 23-24). Nowhere in Champion's Opposition Brief is this testimony disputed.

2. According to the EAF in question (R.92: id., Ex. 116, JA Pg. 559-560), it was prepared and signed by Mr. Makofsky in January 1989, several months prior to Ms. Moty's evaluation. Mr. Makofsky wrote to Ms. Moty in April 1989 asking her to review Appellant's salary grade for the Safety Management position in order to see if a change was warranted.[11] (R.124: Ex. 22, JA Pg. 899). Ms. Moty knew

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work with all business units, including not only paper mills, but also DairyPak, Timberland and Wood Products operations. She dealt with all of these divisions. (R.145: id., Pg. 15-18, JA Pg. 1989-1992). Ms. Merritt worked with Appellant at Champion (R.145: Merritt depo., Pg. 19-22, JA Pg. 1993-1996) and was thoroughly familiar with Appellant's Safety Manager position as well as with the position of Loss Prevention Supervisor at paper mills. In fact, she was the immediate supervisor of Robert Ross, a Safety Manager/Loss Prevention Supervisor at Sheldon, Texas. (R. 145: id., Pg. 133-134, JA Pg. 2019-2020).

[11]Makofsky's April, 1989 memo to Moty reveals virtually nothing about Appellant's job responsibilities other than for RCRA, which was already on the EPD which Ms.

two things for sure in May, 1989, when she "evaluated" the Safety Manager position: that Mr. Makofsky had recommended that position to be a nonmanagerial grade 12, title change only and that Appellant had been treated accordingly for the preceding 8 months. It is inconceivable that Ms. Moty would attempt to determine the propriety of a change without knowing what the current grade was AND THAT MR. MAKOFSKY WAS RECOMMENDING NO GRADE INCREASE, ONLY A TITLE CHANGE. Second, Ms. Moty also knew that she had inadequate information regarding Appellant's Safety Manager job responsibilities to make an accurate, reliable grade evaluation, infra, at Pg. 14, Para. 4. If Ms. Merritt is to be believed, the EAF's "were not changed..." they were sent to Human Resources and APPROVED "AS RECOMMENDED." (R.145: id., Pgs. 254-257, JA-Pg. 2027-2030). THUS, THERE IS A DIRECT NEXUS BETWEEN MR. MAKOFSKY'S EXPRESS RECOMMENDED VIEW, COMMUNICATED TO MS.

Moty already had. If, according to Ms. Moty, the job description was so "very vague," why did she not ask for more detail? This further demonstrates her dependent reliance on Mr. Makofsky's "misinformation" and gender-biased recommendation.

MOTY AND MS. MOTY'S CONFORMING EVALUATION. MS. MOTY "EVALUATED" THE POSITION EXACTLY "AS RECOMMENDED" BY MR. MAKOFSKY ON THE EAF. AS THE RECORD INDICATES, IT WOULD HAVE BEEN HIGHLY EXTRAORDINARY FOR HER TO DO OTHERWISE, PARTICULARLY ON HER OWN. This is entirely consistent with Mr. Gerber's testimony that Ms. Moty "did not make independent decisions." (R.139: Gerber depo., Pg. 584-585, JA Pg. 1533-1534). Ms. Moty's decisions were dependent, not independent.[12] While Champion waves the flag of Ms. Moty's independence, Champion does not cite one shred of evidence disputing the direct nexus between Mr. Makofsky's EAF recommendation and the Compensation Department's

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[12] Even the language used by the Compensation Department in communicating salary grade evaluations so indicates. In Appellant's case, the written confirmation refers to an "agreement" between Mr. Makofsky and Ms. Moty as to the salary grade 12. (R.124: Ex. 12, Memo from Moty to Makofsky of May 16, 1989, JA Pg. 708 & 934). As Ms. Merritt explained, Compensation necessarily relies on the contents of an EAF prepared by the employee's immediate supervisor because that supervisor has more practical familiarity with the specific job content and thus RECOMMENDS FOR APPROVAL a salary grade. (R.145: id., Pg. 299-300, JA Pg. 2031-2032).

determination.

3. When we urge that Mr. Makofsky "intervened," we do not use that word loosely. Mr. Makofsky was an interloper, obviously going out of his way to intercede. Per Champion's standard operating procedure, the EAF was to be initiated by Mr. Ray, Appellant's then immediate supervisor (R.92: Ex. 98, Pg. 5, JA Pg. 468, within 464-470). The next signator should have been Mr. Bensing, Mr. Ray's then immediate supervisor. This procedure was invariably followed at Champion, except in Appellant's case. It is not clear WHEN OR EVEN WHETHER Mr. Ray signed this EAF.[13] Around September or October of 1988, Mr. Ray expressed his view to Appellant that her new position of Safety Manager would have much greater responsibility at a higher level with a salary and salary grade commensurate with her "peers." (Fritsch and Beck, grades 15 and 16 and Plant

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[13] From the copy of the EAF, (Champion was unable to produce the original), it is impossible to tell if Mr. Ray actually signed it, or if somebody else signed it or even if an attempt was made to white-out whatever might have been on the appropriate signature line. Unlike other EAF's, no date of signature appears on the line where Mr. Ray would have been expected to sign, if in fact he ever signed it. (R.92: id., Ex. 116, JA Pg. 559-560).

Managers, R.124: Ex. 9, JA Pg. 701, within 698-701 which includes as peers "plant managers" as opposed to R.124: Ex. 10, JA Pg. 705, within 702-705 where "plant managers" has been whited-out). THIS IS WHAT ORDINARILY SHOULD HAVE BEEN INDICATED ON THIS EAF---SIGNED BY MR. RAY AND HIS SUPERVISOR, MR. BENSING, BEFORE OR IMMEDIATELY AFTER THE EFFECTIVE DATE OF OCTOBER 1, 1988. Mr. Makofsky should have had no role in Appellant's EAF, salary grade or salary at this particular time. Mr. Makofsky should have had no role in April, 1989, when he asked Ms. Moty if she thought a grade change was warranted, incompletely "informing" her of Appellant's job responsibilities.[14] (R.124: Ex. 22, JA Pg. 899). Champion neither offers nor articulates any explanation or legitimate business reason for Mr. Makofsky's intervention. Champion neither offers nor articulates any explanation or

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[14] At this point in time, Appellant was appropriately directing her inquiries to her immediate supervisor, Mr. Ray, not to Mr. Makofsky, who was not in any line of reporting authority to Appellant. Appellant never learned until discovery in this action that Mr. Makofsky had had anything to do with her EAF, salary or salary grade during the period January through August, 1989, when Mr. Ray was her immediate supervisor.

legitimate business reason as to why Ms. Moty so willingly accommodated Mr. Makofsky's intervention without even raising a question or consulting Mr. Ray; after all, Mr. Ray was the individual most knowledgeable about the responsibilities of the Safety Manager position, having himself created this new position.

4. A clear knowledge of Appellant's Safety Manager responsibilities is indispensable to a proper grade evaluation. (R.124: Ex. 13, Exempt Position Description Preparation Guide, Pg. 2, JA Pg. 712, within 710-738). Ms. Moty and Champion's Compensation expert, Ms. Bentson, both indicated that the job description on the EPD did not have sufficient information to accurately evaluate the salary grade for the Safety Manager position. (R.124: id., Ex. 10, JA Pg. 702-705; R.128: Bentson depo., Pg. 116-118, JA Pg. 1212-1214 and 134, JA Pg. 1215; R.148: Moty depo., Pg. 483, JA Pg. 2101). By Ms. Moty's own testimony:

> Q: "Where would you look to obtain the additional information you would need to have in order to determine if Ms. Keyerleber as safety manager had a managerial position?

A: IN THIS PARTICULAR CASE I WOULD PROBABLY TALK TO BARRY MAKOFSKY." (Emphasis added) (R.148: id., Pg. 381-384, JA Pg. 2092-2095).

But Mr. Makofsky, the person to whom Ms. Moty said she would probably look, testified as follows:

Q: "When she became a safety manager from her previous position of safety coordinator, do you know whether or not there were any changes in her job responsibilities?

A: NO, I DON'T." (R.144: Makofsky depo., Pg. 128, JA Pg. 1934).

EITHER MR. MAKOFSKY KNEW APPELLANT'S RESPONSIBILITIES AS SAFETY MANAGER AND INTENTIONALLY OMITTED ENLIGHTENING MS. MOTY OR HE CHOSE NOT TO FIND OUT. Champion offers no explanation or legitimate business reason for Mr.

Makofsky's failure to fully advise Ms. Moty as to the true job responsibilities of Appellant's Safety Manager position. Moreover, there is no evidence in this record indicating that Mr. Makofsky ever consulted with Appellant or even with Mr. Ray to obtain this information. There is no evidence that Ms. Moty ever consulted Mr. Ray, Appellant, or anyone other than Makofsky, notwithstanding the fact that Ms. Moty regarded the EPD as "very vague." (R.148: id., Pg. 483, JA Pg. 200). The only written sources for this information available to Ms. Moty were the vague EPD (R.124: id., Ex. 10, JA Pg. 702-705) and the EAF (R.92: id., Ex. 116, JA Pg. 559-560), which contained no job duty information. IF THERE WERE NO EVIDENCE EXPLAINING MR. MAKOFSKY'S MOTIVATION FOR HIS UNIFORMED AND/OR UNINFORMING FAILURE TO COMMUNICATE TO MS. MOTY APPELLANT'S CONSIDERABLE SAFETY MANAGER JOB RESPONSIBILITIES, THIS WOULD BE A DIFFERENT CASE. HOWEVER, THIS RECORD THOROUGHLY DEMONSTRATES MR. MAKOFSKY'S MOTIVE: NAMELY, THAT HE WAS GENDER-BIASED AGAINST FEMALES WHOM HE DID NOT BELIEVE SHOULD HOLD MANAGERIAL POSITIONS IN A CORPORATION. CHAMPION'S EXPLANATION

ESSENTIALLY HOLDS THAT MS. MOTY'S INDEPENDENT ASSESSMENT OF SALARY GRADE 12 WAS "COINCIDENTALLY" THE SAME AS MR. MAKOFSKY'S RECOMMENDATION. THE ISSUE OF WHETHER OR NOT THE MOTY-MAKOFSKY CONGRUENCE IS A MERE COINCIDENCE OR A RESULT OF MAKOFSKY'S GENDER-BIAS IS A CONFLICTING FACTUAL QUESTION TO BE DECIDED BY A JURY, NOT BY A COURT IN A SUMMARY JUDGMENT PROCEEDING.

5. Perhaps the two most critical documents in this case are the January 1989 EAF and the March 1989 EPD. (R.124; Exs. 9, JA Pg. 698-701; Ex. 10, JA Pg. 702-705; R.92; Id., Ex. 116, JA Pg. 559-560). Both relate to the Safety Manager salary grade; both predate Ms. Moty's May, 1989 "evaluation" and BOTH HAVE BEEN TAMPERED WITH AND ALTERED.[1] With respect to the EAF, Champion offers no explanation for this extraordinary circumstance. Champion does offer two responses. First, the hyperbole that we claim Champion created about its contract in

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[1] We will not reiterate the extensive discussion on this issue already covered in our Opening Brief (at Pgs. 24-32).

documents---and---second, that our claims represent "amateur detective work"..."founded solely on innuendo and speculation." (Appellee's Op. Br. at Pg. 7). Both responses are just plain inaccurate. We never, ever expressly or impliedly accused counsel of altering or destroying evidence. The second response is totally false. Our evidence reveals that the EXIF was altered. By crying "speculation," Champion attempts to divert attention from the fact that it has no "explanation" whatsoever based upon any facts in the record. This EXIF document is so obviously altered, that Champion cannot "articulate" any possible explanation, not even a mistake.

With respect to the EPD, the fact that it was altered is undisputed. (R.124: Ex. 10, 1A, Pg. 702-705). The fact that Champion judicially admitted that it was altered (per Requests for Admissions) is undisputed. The fact that the alteration of the original could not be seen on the photocopy produced by Champion is undisputed. The fact that the only way we were able to discover the alteration was by demanding production of the original is undisputed. The effect of the alteration, to give the initial false impression that the practice in designating pieces conformed to the printed definitions in the

EPD (i.e., employees reporting to the same supervisor as the incumbent), is undisputed. Only after considerable discovery did the DairyPak practice become clear that "peers" typically listed on EPD's were employees with positions comparable in scope and responsibility to the incumbent, whether or not they reported to the same supervisor. (Appellant's Opening Br., Pg. 27-28, ¶19).

6. Finally, there is the proof that Ms. Moty's May, 1989 evaluation is indefensible. It is transparently uninformed and contrived. That is why Ms. Moty's testimony is so vacuous.[6] That is why Mr. Gerber, Mr. Clem and Ms.

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[6] Not because, as counsel argues, she was so "intimidated" by the supposed "bullying, intimidating manner and constant interruptions of Appellant's counsel and his "intimidating mannerisms" and "tone of voice," which made her "very uncomfortable." (Appellee's Opp. Br., Pg. 37). This deposition is on videotape and, if desired, can be viewed by the Court. The reason Ms. Moty felt "very uncomfortable" is because, in many respects, she didn't know what she was talking about, and because she was prevaricating, thereby revealing the unfounded and uninformed basis of her evaluation, which indicated anything but the exercise of independent, professional judgment. More importantly, by accepting, as explained, Ms. Moty's dubious testimony as to the fact that she was uncomfortable, intimidated, caused stuttering, and/or lost her train of thought, Appellee asks Ms. Moty, entitled to such an incredible manner because she was [illegible] uninformed, unqualified and/or intimidated to be a

Merritt variously testified that the internal and external comparisons Ms. Moty chose to use as well as her ultimate salary grade assessment bore no relationship to Appellant's position of Safety Manager. Champion's own compensation expert, Ms. Bentson, testified that THE JOB DESCRIPTION ON THE MARCH, 1989 EPD WAS SO VAGUE THAT IT WOULD BE DIFFICULT TO DO A FULL AND ACCURATE GRADE EVALUATION BASED UPON IT. (R.128: Bentson depo., Pgs. 116-118, JA Pg. 1212-1214 and Pg. 134, JA Pg. 1215).

Mr. Makofsky, while Appellant's immediate supervisor, stated more than once that women should not be managers in a corporation. (R.154: Yuncker depo., Pg. 33-35, JA Pg. 2358-2360; R.152: Palos depo., Pg. 609-610, JA Pg. 2266-2267). When confronted with Appellant's objection to being excluded from meetings by Mr. Anderson because she was a woman, Mr. Makofsky never discussed it with Mr.

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jury to determine. The credibility of Ms. Moty is a major issue in this case. At this stage, this Court should view her credibility as we see it, in the light most favorable to Appellant, the non-moving party. Champion tries to misdirect this Court's focus by accusing us of making "a gratuitously nasty personal attack of (sic) Ms. Moty's testimony." (id., at 37).

Anderson and joked about it to Appellant's face.[17]

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[17] In a gross departure from the record, Champion states that Appellant's complaints to Mr. Makofsky about Mr. Anderson's remarks "CERTAINLY DID NOT ALERT MAKOFSKY TO GENDER DISCRIMINATION --- THEY CONCERNED KEYERLEBER'S DISAGREEMENT WITH ANDERSON'S BUSINESS DECISIONS." (Emphasis added) (Appellee's Opp. Br., Pg. 30). Appellant specifically testified that when she learned Mr. Anderson had stated "that women are only good for one thing, flat on their back" and "that was a great meeting because we didn't have any females there," (a meeting which Appellant was to attend but for Mr. Anderson's last-minute request to her that she not do so), Appellant immediately told Mr. Makofsky about these specific remarks (remarks which, according to the testimony of Mr. Dorociak and Ms. McConnell were, in fact, made by Mr. Anderson). (R.112: Keyer. depo., Pgs. 67-70, JA Pg. 1609-1612; R.116: id., Pgs. 160-165, JA Pg. 1624-1629; R.113: id., Pgs. 594-595, JA Pg. 1672-1673; R.134 or R.159: Dorociak depo., Pgs. 19-20, JA Pg. 1284-1285; R.142: McConnell depo., Pgs. 17-19, JA Pg. 1977-1979). As indicated, Champion disingenuously and euphemistically characterizes Appellant's complaints to Mr. Makofsky about Anderson's remarks as Appellant's "disagreement with Anderson's business decisions". We submit that "business decisions," adverse to female employees, which are based upon pure, unadulterated gender bias, are precisely the kinds of "business decisions" prohibited by O.R.C. 4112.02(A). If these remarks, as Champion claims, did not "alert Makofsky to gender discrimination," the ONLY fair inference is that Makofsky himself is infected with the same sexist animus as Anderson. This is the case, not only because Makofsky did not mention it to Anderson (R.127: Anderson depo., Pg. 135-137, JA Pg.

The evidence in this record permits a reasonable conclusion that there is a direct nexus between Mr. Makofsky's gender-biased animus and his intervention, resulting in the adverse employment consequences suffered by Appellant. Champion's articulated legitimate, nondiscriminatory business justification does not comport with the evidence. The attempt to insulate Mr. Makofsky from Ms. Moty's "evaluation" fails. There is abundant proof that Ms. Moty was neither independent of Mr. Makofsky nor informed by him or by anybody else of Appellant's Safety Manager job responsibilities. Moreover, in light of the phony documents, the credibility of Champion's claims is open to serious question.

III. STRAY REMARKS

Appellee erroneously claims that Mr. Makofsky's gender-biased, stereotypical statements are stray remarks. (Appellee's Opp. Br. at P. 25). Appellee relies on Gagné v.

1205-1207), not only because Makofsky thought it was funny, but also because Makofsky never reported this violation of Champion's Code of Business Conduct to the Corporate Compliance Committee. (R.124: Ex. 8, Champion International Code of Business Conduct, "Reporting Violations" at Pg. 2, JA Pg. 684 and at Pg. 6, JA Pg. 688, within 681-691).

Northwestern Nat'l Insurance Co., 881 F.2d 309, 314 (6th Cir. 1989) and Smith v. Firestone Tire & Rubber Co., 875 F.2d 1325, 1330 (7th Cir. 1989), which essentially hold that an isolated statement not directed at any particular individual is insufficient to create an issue of material fact. However, Gagné and Smith are inapplicable to the case-at-bar.[18]

Appellee also inappropriately relies upon Byrnes v. LCI Communication Holdings Co., 77 Ohio St. 3d 125

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[18]In Gagné, the Plaintiff's supervisor made a single statement to a large meeting that he "needed younger blood," which Plaintiff herself characterized as having been made facetiously. (Id. at 314). Indeed, in Gagné, Plaintiff's personnel record demonstrated performance deficiencies. Neither of these factors are present in our case. Likewise, Smith v. Firestone Tire & Rubber Co., supra, is also distinguishable. This was not a summary judgment case. In fact, the Seventh Circuit had concluded that plaintiff had established a *prima facie* case, but only failed to show that the Defendant's reasons for the termination were pretextual! Id. at 1327. Also, the Plaintiff in Smith had numerous performance-related deficiencies. Finally, the statements in Smith consisted of the following: "Jerry Mills (plaintiff's supervisor) did not like plaintiff's 'type' and that one of plaintiff's 'type' was enough." Id. at 1329. There was no specific reference to plaintiff's race. Moreover, the plaintiff in Smith offered no other evidence that any employment procedure had been ignored or that white supervisors were treated differently.

(1996), and Coleman v. Toys "R" Us, Inc., 976 F. Supp. 1713, 1718 (N.D. Ohio 1997). These decisions do not apply to the facts of our case because the discriminatory statements made by Mr. Makofsky were causally connected to the adverse employment actions taken by him against Appellant.

In Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325 (6th Cir. 1994), this Sixth Circuit Court of Appeals set forth the following factors to consider when determining whether a stray remark is actionable for race or sex discrimination: (1) was the comment made by a decision-maker or an agent in the scope of employment; (2) was the comment related to the decision-making process; (3) was the comment an isolated remark; and (4) was the comment in proximity to the alleged discriminatory act. In the instant matter, the comments were made by Mr. Makofsky who was a decision-maker acting within the scope of his employment; his comments related to the decision-making process: Appellant was the only female manager under his direct supervision and the nature of his adverse conduct toward Appellant was literally pursuant to his expressed view; Makofsky's comments were not isolated: they were in a context of overall conduct, attitude and remarks, while he was Appellant's immediate supervisor, and in temporal proximity to his ongoing discrimination towards

Appellant.

Indeed, comments suggesting that the employer may have considered impermissible factors are often relevant to a disparate treatment claim.[19]

Merrick v. Farmers Ins. Group, 892 F.2d 1434, 1438 (9th Cir. 1990). For example, in Kehoe v. Anheuser-Busch, Inc., 995 F.2d 117 (8th Cir. 1993), the appellate court reversed the district court's granting of summary judgment in holding that the employee had made out a prima facie case of age discrimination by demonstrating material issues of fact as to whether the articulated reasons for the discharge were pretextual. Id. at 119-120. In Kehoe, a portion of the evidence relied upon by the appellate court included statements made by the Plaintiff's senior manager that he and an older co-worker were "moochers," a phrase which a co-worker who submitted an affidavit on behalf of the Plaintiff "interpreted as equating Mr. Kehoe with someone who is retired." Id. at 119. *See also* Beshears v. Asbill, 930 F.2d 1348 (8th Cir. 1991) (statement by the president of the employer that "older employees have problems adapting to changes and to new policies," and a statement by another official that Plaintiff's position "had been offered to a younger man and that young people were adaptable to corporate policies" were not stray or random comments); Blake v. J.C. Penney Co., Inc., 894 F.2d 274, 276-78 (8th Cir. 1990) (statements that Plaintiff was a "senile old woman" and "senile old thing" were evidence of age discrimination where the employer tolerated such age-directed insults); Samarzia v. Clark County, 859 F.2d 88, 91 (9th Cir. 1988) (supervisory and co-worker references to Plaintiff as the "senile intact officer" constituted evidence of intentional discrimination;

Champion attempts to distinguish this Court's opinion in Talley v. Bravo Pitino Restaurant, Ltd., 61 F.3d 1241, 1247 (6th Cir. 1995) by noting that summary judgment for the employer was reversed because of "repeated" racial slurs.[20]

Holmes v. Marriott Corp., 831 F. Supp. 691, 706 (S.D. Iowa 1993) (supervisor's statements "too old to do the job," "senile" and "not as young as he use to be" may reasonably be interpreted by a jury as providing "support for an inference that age discrimination was a motivating factor in...[the] decision to discharge...[him].") *See also* Siegel v. Alpha Wire Corp., 894 F.2d 50 (3rd Cir. 1990) ("old dogs won't hunt" indicates age bias which could support a verdict in Plaintiff's favor); McKinna v. Lasco, Inc., No. 02A01-9604-CH-00083, 1997 Tenn. App. LEXIS 200 (March 20, 1997) (the supervisor's age-related comments: "Well, man, you're getting old, aren't you?; Roger can run more heads than you;" "Old man, you're either going to shape up or ship out;" and "You're getting old and fat and can't keep up" were sufficient comments to reverse summary judgment in favor of Defendant).

[20] The opinion does not indicate whether "repeated" means a couple of times, several, many or constantly. Champion's observation that Mr. Makofsky's gender-biased remarks "occurred only twice in Plaintiff's 17-year tenure at Champion" (Appellee's Opp. Br., Pg. 27) is an effort at obfuscation. Mr. Makofsky was Appellant's immediate supervisor for less than 4 of those 17 years. Those remarks were made in 1990 and 1991, when Appellant was the only female manager in DairyPak, Corporate, and the only female manager Makofsky ever directly supervised. They were made AT THE VERY TIME APPELLANT WAS PLEADING

(Appellee's Opp. Br., pg. 27). Although true that general derogatory statements were made in that case referring to Plaintiff's race, the court considered all of the evidence in concluding that Plaintiff had produced sufficient support to establish his Title VII claim. Id. at 1250. Indeed, what Talley actually held is that an inference of discrimination may be drawn from expressions of discriminatory thought or

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WITH MR. MAKOFSKY TO REVIEW HER JOB RESPONSIBILITIES, her salary and salary grade(R.144: Makofsky depo., Pg. 125-126, JA Pg. 1931-1932) --- and at the time when Appellant was apprising Mr. Makofsky of her exclusion from meetings by Mr. Anderson because of his blatantly expressed gender bias. Mr. Makofsky's gender animus is also evidenced by his expressed jocular and indifferent attitude toward Appellant's justified complaints concerning Mr. Anderson as well as Mr. Makofsky's refusal to accord Appellant participation to which she was entitled in the MDC training, which he authorized for eligible male employees. Finally, it is not a fact, as Champion asserts, that he only expressed his view twice that women should not be managers in a corporation. The only testimony we were able to produce was from a former employee who twice overheard him make that particular, specific remark. When all of Mr. Makofsky's actions, inactions, attitudes and remarks are considered, the situation is "titanic." Just because the ship's captain could only see the tip hardly proves that there wasn't an iceberg below! How many times does Makofsky have to say it before a court can hear it?!

stereotyping. In fact, even though the slurs in Talley were not specifically directed to or about the Plaintiff-employee, such discriminatory slurs constituted open "direct evidence" sufficient, in and of itself, to create a triable question of fact. As in our case, who else was being referred to in Talley other than Plaintiff, the only black employee?

Appellee mistakenly claims that the comments and actions of Andy Anderson are not relevant to Appellant's claim of disparate treatment because Anderson was not a decision-maker. (Appellee's Brief, pg. 29). In support of this contention, Appellee relies upon McDonald v. Union Camp Corp., 898 F.2d 1155, 1161 (6th Cir. 1990), and Evans v. Jay Instrument & Speciality Co., 889 F. Supp. 302, 310 (S.D. Ohio 1995), both affirming summary judgments where the discriminatory remarks were not made by the decisionmaker. However, we do not claim that Anderson was a decisionmaker with respect to Appellant's salary grade and salary. Makofsky was the decisionmaker. And it was Makofsky's cavalier attitude, when informed of Anderson's remarks and conduct, which is pertinent to this case.

IV. SIMILARLY SITUATED

Champion attempts to demonstrate that job responsibility differences between the Loss

Prevention/Environmental supervisors at paper mills on the one hand and those of the DairyPak Safety/Loss Prevention Manager/Supervisor on the other negate the validity of any comparison for salary grade purposes (Appellee's Opp. Br., Pgs. 12-13). The thrust of Champion's evidence is that the job contents of the Loss Prevention/Environmental supervisors at paper mills in

contrast with the Safety Manager position at DairyPak plants are so different that they are neither "identical" nor "nearly identical" --- and thus not similarly situated as a matter of law. (Mitchell v. Toledo Hosp., 964 F. 2d 577 (6th Cir. 1992)).

If there was no evidence whatsoever of any unlawful discriminatory motive in this case (as in Mitchell), or if there was affirmative evidence of performance deficiencies on the part of Appellant (as in Mitchell), such a strict "identical-nearly identical" job content comparison might make sense. However, that is not the case here. In order to be fair, it is necessary to view these job content comparisons in the evidentiary context of the claim Appellant is making, rather than the claim that the Plaintiff in Mitchell was making.

Our claim of gender discrimination is neither solely nor necessarily dependent upon a Mitchell-type comparison. Environmental supervisors at paper mills had salary grade 15.

Loss Prevention supervisors at paper mills generally had salary grade 14 (R.92: Ex. 81, JA Pg. 332-333). The lowest "managerial" grade for Loss Prevention positions FOR EVERY CHAMPION BUSINESS UNIT WAS 13. (R.124: Ex. 31, JA Pg. 933 & 939, within 933-943). WITH THE SOLE, SOLITARY EXCEPTION OF APPELLANT, NO OTHER LOSS PREVENTION OR ENVIRONMENTAL MANAGER OR SUPERVISOR IN THE ENTIRE COMPANY HAD A SALARY GRADE BELOW 13 FROM 1988 THROUGH JUNE 1994.[21] AND THE ONLY FEMALE SAFETY MANAGER IN THE ENTIRE COMPANY WHOSE IMMEDIATE SUPERVISOR WAS MR. MAKOFSKY WAS APPELLANT GIGI KEYERLEBER!

Our claim is not wedded to any particular salary grade over 12. There is evidence in this record reasonably supporting legitimate salary grades for Appellant's position

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[21] This includes positions at the Regional Level, Divisional Level, Corporate Headquarters level, Plant Level, paper mill level, Forest Products Division, DairyPak Division, Printing & Writing Business Unit, Paper Mill Business Units, advisory positions, hands-on positions, with or without full or partial operational authority, with or without direct and/or indirect supervisory authority.

from 14 on up. We have limited our argument to Appellant's gender-biased salary grade of 12, with respect to which we believe there is overwhelming evidence refuting any claim that this was a legitimate, nondiscriminatory business decision.

Viewed in this light, it would be inappropriate to throw Appellant out of court simply because Loss Prevention/Environmental job responsibilities as between paper mills and DairyPak plants are not "exactly" the same. Rather, evidence of the salary grades and job responsibilities of Loss Prevention/Environmental supervisors at paper mills is relevant, but not necessarily dispositive, to a fair understanding of the real meaning of Appellant's salary grade 12. Jatoi v. Hurst-Euless-Bedford Hospital Authority, 807 F.2d 1214 (5th Cir. 19987). Likewise, the positions of Messrs. Striley-Divisional (grade 17) (R.147: Moty depo., Ex. 29, JA Pg. 2068 and 31, JA Pg. 2069) and Oberstadt-Corporate (grade 15) (R.124: Ex. 17Q, JA Pg. 752 & 771, within 746-780) are relevant --- in part because Messrs. Clem and Gerber thought so and so advised Ms. Moty at the May, 1994 meeting. (R.137: Gerber depo., Pg. 154-155, JA Pg. 1373-1374).

There is considerable evidence of the great similarity between a paper mill and a DairyPak Loss Prevention

Supervisor. In fact, the evidence demonstrates that Appellant had broader duties: both environmental and loss prevention/safety responsibilities for multi-facilities at the regional level in DairyPak. Comparing a detailed listing of loss prevention supervisor responsibilities at the Pensacola, Florida paper mill with her responsibilities in loss prevention in DairyPak plants, Appellant testified that "at least 95 percent of this document applies to a DairyPak facility just as much as it applies to a paper mill." (R.118: Keyer. depo., Pg. 2308-2310, specifically Pg. 2310, JA Pg. 1886-1888; specifically JA Pg. 1888, R.124: id., Pensacola Mill Overview document, Appellant's notations thereupon, Ex. 42B, JA Pg. 1033-1037).[22]

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[22] See also, the Loss Prevention Manual cover letter of February 14, 1990 applicable and issued to "each Champion location," referring to standards to be implemented to operate safe facilities. This document is applicable TO ALL FACILITIES, including paper mills and DairyPak plants. (R.143: Maduzia depo., Pg. 54-55, JA Pg. 1902-1903 and Ex. 3, JA Pg. 1904); also see "DairyPak Loss Prevention Program Summary" of February 5, 1991, prepared by Appellant during her employment with Champion, identifying all of her responsibilities in connection with her loss prevention duties in DairyPak. This document reveals that with very few exceptions, Appellant's responsibilities for her DairyPak plants were essentially the same as for paper mills. R.124: id., Ex. 27B, 6 Pages, JA Pg. 920-925).

typically had no more employees and no more sales than THE COMBINED SEVEN DAIRYPAK PLANTS FOR WHICH APPELLANT WAS RESPONSIBLE.[23]

Not only did Appellant's position include virtually every single responsibility of a paper mill loss prevention supervisor, but also included, in addition, many of the responsibilities of a paper mill environmental manager.[24]

There was no other Safety/Loss Prevention Manager or supervisor in the entire Champion corporation who, like Appellant, had supervisory responsibilities for all safety/loss

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[23]The approximate 1300 employees in the seven DairyPak plants is greater than the number of employees in 8 out of the 10 individual paper mills. (R.124: Keyer. Aff., Par. 3, Ex. 6, attached thereto, JA Pg. 677-679 & 679A). With respect to sales, the unit sales of DairyPak plants was $300 million, larger than the mill sales of $234 million at Hamilton, Ohio, approximately the same as the mill sales in Pensacola, Florida, and smaller than the Canton, North Carolina and Courtland, Texas paper mills. (R.129: Bentson depo., Ex. 4, JA Pg. 1222-1225).

[24]Appellant also had certain responsibilities which neither loss prevention nor environmental supervisors had at a paper mill, in particular, responsibility for FDA regulations along with participation in FDA audits. (R.124: id., Ex. 27, JA Pg. 908-909, within 908-925).

prevention functions and, in addition, supervisory responsibilities for environmental programs.[25]

Appellee attempts to make minute distinctions with respect to details of the paper mill and DairyPak plant safety and environmental responsibilities. Naturally, there are different kinds of chemicals and machinery in a paper mill as compared to a DairyPak plant. The testimonies of Carolyn Merritt and Charles Gerber indicate the insignificance of these kinds of distinctions from the standpoint of job duties, responsibilities and level of responsibilities. Their testimonies clearly indicate that these kinds of distinctions were so insignificant that they could not be the basis of a rational business judgment for the 2 to 3 grade differentials between Appellant's position and the positions of loss prevention supervisors and environmental managers in paper mills. (R.139: Gerber depo., Pg. 536-560, JA Pg. 1485-1509; R.145: Merritt depo., Pg. 22-33, JA Pg. 1996-2007, Pg. 41-

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[25] The individual paper mills and the Forest Product Division, which were of comparable size to the DairyPak division, all had separate designated environmental supervisors/managers who were responsible for their environmental programs and regulations.

42, JA Pg. 2008-2009 and Pg. 59-61, JA Pg. 2016-2018).[26]

In concluding that these positions are comparable and similarly situated, Ms. Merritt testified as follows:

> "I believe the positions, because Gigi had multiple locations and had to implement the same types of programs, it would be COMPARABLE to a loss prevention supervisor at a single paper mill." (Emphasis

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[26] In 1992, Champion published a document entitled "EHS Job Structure Recommendations," R.92: Ex. 83, Appendix B, Bates P-00122-53-00127, JA Pg. 366-371), describing in detail the loss prevention functions at a paper mill. (Note that this description is comprehensive. Not all loss prevention supervisors at all paper mills were responsible for all of the listed functions). (R.138: Gerber depo., Ex. 14 (Mr. Ault, no fire), JA Pg. 1457-1459; Ex. 17 (Mr. Kassabaum, no work. comp. or fire), JA Pg. 1460-1462; Ex. 18 (Mr. McGuan, no work. comp.), JA Pg.1463-1464; Ex. 19 (Mr. Peacock, no work. comp. or fire) JA Pg. 1465-1467; and Ex. 20, (Mr. Robison, no fire), JA Pg. 1468-1470). (Note also that this description applies only to loss prevention functions and includes no environmental functions). Even a cursory review of Appellant's job responsibilities as Safety Manager indicates virtually identical job functions and very similar job duties. (See pgs.3-6, supra.; R.124: Ex. 27, and 27B, JA Pg. 908-909 & 920-925, and Ex. 46, JA Pg. 1050-1060). The only real difference is that Appellant's responsibilities were for multiple facilities as opposed to a single mill.

added) (R.145: Merritt depo., Pg.. 316, JA Pg. 2033).

The "multiple location" consideration favorably impacted salary grades and salaries of male loss prevention supervisors, but not Appellant.[27]

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[27] In 1986, Mr. Robison was promoted (i.e. grade increased) to the position of Loss Prevention Supervisor, Forest Products, and given a $5,000 promotional raise for being assigned to the Corrigan, Texas facility in addition to the Camden, Texas facility. The Personal Action Notice made these changes effective FIRST and then, thereafter, the Position Description was "submitted for evaluation." (R.124: Ex. 55, JA Pg. 1090).

In 1987, an EPERR was done for Loss Prevention Supervisor, Camden-Corrigan, for a successor incumbent to Mr. Robison, to be announced. The ONLY change was responsibility for one added facility. Based upon this one factor, the grade moved from 11 (for Safety Engineer) to 13 (Loss Prevention Supervisor). In stunning language, approved by Ms. Kenaga, the analyst wrote: "THE SUBJECT POSITION IS RANKED EQUAL TO THE LOSS PREVENTION SUPERVISOR GRADE 13, AS PRINTING AND WRITING PAPER MILLS, BECAUSE THE SUBJECT POSITION'S OVERALL REGIONAL ACCOUNTABILITY EQUALS IN TERMS OF EMPLOYEES SERVICED AND SALES SIZE TO THE LATTER POSITION. THE OFF-SITE ACCOUNTABILITY OF THE SUBJECT POSITION MAKES IT SOMEWHAT MORE COMPLEX, ALTHOUGH

Mr. Gerber testified that a risk is a risk, whether it is in a paper mill or a DairyPak plant. Both operations have inherent risks and are the same in that respect. (R.137: Gerber depo., Pg. 22-23, JA Pg. 1302-1303; R. 139: Gerber depo., Pg. 556, JA Pg. 1505; R.113: Keyer. depo., Pg. 407, JA Pg. 1656).

V. THE MDC TRAINING

Mr. Makofsky treated Appellant "differently" from "similarly situated" males when he refused to allow her to attend the Management Development Core (MDC) training programs. Champion's attempted "nondiscriminatory reason" is that these courses "were designed for individuals who directly supervise other people. Also, the training catalog provided to Plaintiff indicates that the MDC courses provide training designed to help managers deal effectively with their direct subordinates."[28] (Appellee's Opp. Br., Pgs. 42-43).

ITS BASIC DUTIES ARE SIMILAR TO THE LATTER POSITION." (R.124: Ex. 56, bates D7023, JA Pg. 1094, within 1091-1099).

[28] Contrary to Champion's representation, Champion's "Education and Training Manual" NOWHERE indicates that this MDC training is limited to managers who DIRECTLY supervise other people. (R.92: Ex. 112, JA Pg. 515-558). Mr. Makofsky testified that these courses "were designed for

There are various types of position categories listed for these training courses. Appellant fits into category 3: "All newly appointed managers attend the three Management Development Core Programs (MDC) where the focus is on critical management skills, knowledge, and values as well as the capability to lead people in an increasingly competitive world." (R.92: Ex. 112, Pg. 3, JA Pg. 520).

According to Ms. Moty, a manager is one who "generally supervises a FUNCTION and may or MAY NOT supervise people who are engaged in the activities of that function." (R.148: Moty depo., Pg. 372, JA Pg. 2083). This perfectly describes Appellant's Safety Manager's position. Appellant, as Safety Manager, indirectly supervised 20 people. (R.124: Ex. 9, EPD, Pg. 2, JA Pg. 699, within 698-701). Appellant's management functions required the development of critical management skills in her regular dealings, both individually and collectively, variously with plant managers, supervisors, forepersons and hourly employees. She

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people who supervised other people." (R.144: Makofsky depo., Pg. 266, JA Pg. 1963). He did not say "directly" supervised. This limitation was gratuitously slipped in by Champion's counsel. Nor did Mr. Makofsky ever so inform Appellant. (R.113: Keyer. depo., Pg. 460-461, JA Pg. 1658-1659).

organized and led group training and task forces attended by plant managers and others.[29] (R.144: Makofsky depo., Pg. 265-266, JA Pg. 1962-1963). The Training Manual expressly states: "Enrollment in the Management Development Core (MDC) is automatic upon becoming a manager for the first time" (R.92, Ex. 112, Pg. 6, JA Pg. 523, within 518-558) and "within 120 days of appointment to their position." (R.92, id., Pg. 13, JA Pg. 530, within 518-558). According to Mr. Makofsky, Mr. Fritsch, (DairyPak Manager, Graphic Arts), supervised NOBODY. (R.144: id., Pg. 266, JA Pg. 1963). As DairyPak Director of Administration, Corporate, from June, 1986 to August, 1993, Mr. Makofsky "was responsible for selecting and scheduling and signing up all DairyPak Managers for Training Seminars." (R.113: Keyer. depo., Pgs. 394-397, JA Pg. 1652-1655; R.144: id., Exs. 1, JA Pg. 1966 and 2, JA Pg. 1967). In that capacity, he approved Mr. Fritsch's attendance but rejected Appellant. Champion argues that Mr. Fritsch was not "similarly situated" to Appellant --- and thus

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[29] Indeed, an essential requirement for her Safety Manager position (not a part of her previous Safety Coordinator position) was "management and administrative skills." (R.124, Ex. 10, Safety Manager EPD, JA Pg. 702-705).

his attendance at MDC training "does not raise an inference of gender discrimination."[30] (Appellee's Opp. Br., Pg.42). After Appellant had repeatedly requested this training from Mr. Makofsky in 1989, she was removed from the training catalog recipient list and never again received another one. (R.113: id., Pgs. 368-370, JA Pg. 1648-1650; R.113, id., Pgs. 459-461, JA Pg. 1657-1659; R.114: id., Ex. 11, JA Pg. 1731).

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[30] For purposes of "similarly situated" with respect to management training, the application of the "nearly identical job content" test would be an absurdity. The Champion management training mandates attendance by ALL new managers "within 120 days of appointment." (R.92: Ex. 112, Pg. 6 and 13, JA Pg. 523 & 530). The mandate has nothing to do with comparative salaries or job content. It has to do with one thing: being a manager (in any area) who interacts with other employees. Male managers in various areas throughout Champion were approved for the MDC training (e.g. Dan McMahon (Product Manager, Cartons, National Accounts Manager), William O'Brien (Credit Manager), and Bruce Oberstadt (Loss Prevention Manager, Corporate) (R.120: Keyer. depo., Ex. 72, JA Pg. 1866-1869). Of considerable importance is the fact that O'Brien and McMahon (in addition to Fritsch) were DairyPak employees whose training was also approved by Mr. Makofsky as DairyPak Director of Administration, Corporate. When it came to approval for training, Appellant's relationship to Mr. Makofsky, as Director of Administration, was exactly the same as Fritsch, O'Brien and McMahon.

VI. PROMOTIONAL SALARY INCREASES FOR RESPONSIBILITIES ADDED TO THE SAME POSITION

Champion states in its Opposition Brief that "Keyerleber baldly asserts that no males at Champion were given increases in responsibility (either with or without a change in title) without an accompanying `promotional' salary increase. (Appellant's Br. at 4,15,37)." (Appellee's Opp. Br., Pg. 16).

This is a good example of the very tired stratagem of setting up a "straw man" which can then be conveniently knocked down.

A review of Champion's claimed supporting references to our Opening Brief reveals that we made no such claim.[31]

With respect to OUR CLAIM, we gave a number of examples of Champion's broad practice of according to exempt male employees substantial raises for significant added responsibilities, while serving within the same position,

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[31] Exempt male employees who received promotions invariably received promotional salary increases along with their promotions. The ONLY exception was Appellant. Thus, we correctly stated in our Opening Brief and repeat here that "no exempt male employee in the DairyPak Division was treated in this manner." (Appellant's Opening Br., Pg.4).

without any salary grade change or promotion.[32] (Appellant's Opening Br., Pg. 15, fn.9).

The three examples cited by Champion (Fritsch, Kassabaum and Oaklief) are not analogous to added responsibilities within the same position.[33] Appellant's added

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[32] As previously noted, Mr. Makofsky, generally consistent with this practice, intervened on behalf of Mr. Ellis by unilaterally increasing his salary grade from 13 to 14. (Appellant's Opening Br., Pgs. 21-22, fn.16).

[33] Mr. Fritsch changed positions, from Manager, Graphic Arts to National Accounts Manager. These are two different positions, both of which were graded at 15. See the Graphic Arts EPD (R.147: Moty depo., Ex. 12, JA Pg. 2047-2050). (Champion's reference to Appellant's testimony that Mr. Fritsch had assumed "some additional responsibilities" is taken out of context. See the next 2 transcript pages: (R.117: Keyer. depo., Pgs. 1621-1623, JA Pg. 1818-1820).

With respect to Mr. Terry Kassabaum, the salary grade for his new position was determined BEFORE he assumed it, not 8 months later. He was changing to a different position; there is no evidence of any added responsibilities while he was holding the new position.

With respect to Mr. Oaklief, there is no evidence as to what the duties were in his new position of Quality Control Supervisor. Moreover, the position had a previous incumbent, Mr. Terry Gladish, whom Mr. Oaklief was replacing (R.92: Ex. 102, EAF-Comments Section, JA Pg. 476). Thus, the new position was an already established position with a previously established salary grade of 11, the same grade as Mr. Oaklief's prior position of Converting Supervisor.

responsibilities occurred during the 1989-1990 period, while she was continuously Safety Manager, unrelated to the assumption of some other entirely different position. (Appellee's Opp. Br., Pgs. 16-17).

Champion's examples have nothing to do with the promotional raise-equity adjustment for added responsibilities while serving in the same exact position. Of course, lateral position moves occur within Champion. Of course, there can be a lateral position change with a title change only, which is not a promotion. However, our evidence demonstrates that in Appellant's case, the move was really a promotion to a managerial position, not a title change only. In addition, the evidence shows that even after Appellant assumed the managerial Safety Manager position, she had substantially increased responsibilities added while in that position. However, unlike other males similarly situated IN THAT RESPECT, Appellant's increased responsibilities were not recognized with a promotional pay raise. Makofsky alone had

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Interestingly, when Mr. Oaklief moved from the nonmanagerial position of Quality Control Supervisor (salary grade 11) to the new managerial position of Plant Manager, he jumped 4 salary grades in one day, from 11 to 15! Of course, he received a promotional increase as well. (R.92: Ex. 103, JA Pg. 477).

the prerogative (without any advance involvement of the Compensation Department) to initiate such a recommendation --- the necessary prerequisite for a promotional-equity raise to occur for added responsibilities while serving in the same position.

Champion states that "Keyerleber admitted in her deposition that the scope of her duties and responsibilities grew between 1989 and 1994, not that her duties remained the same during that period...this type of incremental development is not atypical," which is why Champion's guidelines suggest that "position descriptions should be reviewed and possibly updated every three to five years." (Emphasis Champion's) (Appellee's Opp. Br., Pg. 39). This distortion of the record conveys the false impression that no consideration for an added-responsibility salary raise was warranted in Appellant's case: "Keyerleber's claim that Makofsky discriminated against her because he should have submitted her job for re-evaluation by Compensation every time her position changed, grew or developed in any way is simply without support." (Id., at Pg. 40).

Appellant specifically testified that by 1990, almost 90% of her environmental responsibilities had been added to her Safety Manager position (R.118: id., Pgs. 2151-2153, JA

Pgs. 1880-1881), representing almost half of her time, including the further addition in 1990 of responsibilities for the Waynesville, North Carolina Plant. (R.117: id., Pg. 1530, JA Pg. 1795).[34]

VII. THE 1994 "RE-EVALUATION"

The final outrage occurred in 1994, after Appellant had objected in writing about unfair gender discrimination in her salary grade and pay, and also threatened possible legal action. (R.92: Ex. 37, JA Pg. 151-153; R.117: Keyer. depo., Pg. 1448, JA Pg. 1738). In 1994, Champion did in fact obtain a full and accurate description of Appellant's responsibilities as Safety Manager, responsibilities which had largely been part of her job since 1990. (R.124: Ex. 46, JA Pg. 1050-1060; R.92: Ex. 74, JA Pg. 307-310). A job content evaluation was made by Compensation, resulting in a determination to raise her salary grade from 12 to 13. (R.92: Ex. 76, JA Pg. 311-

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[34] Waynesville was not a folding carton plant, as were the other 6 facilities. It was a bleached board extrusion plant with entirely different equipment and processes (and safety risks). Waynesville employed 280 workers, an addition to the 985 employees in the other plants, a 28% increase in employees for whom Appellant had responsibility with respect to safety. (R.92: Ex. 1, specifically pages 11-12, JA Pg. 102-103, within 88-123).

312; R.137: Gerber depo., Ex. 11, JA Pg. 1384-1385). References to market data were thrown in, permitting Champion to characterize the grade increase as a mere "re-evaluation" instead of a "promotion."[35] As in 1989, Champion's evaluation failed to use accurate external job comparisons. CHAMPION'S 1994 EVALUATION REACHED THE AMAZING CONCLUSION THAT AFTER NEARLY 8 YEARS, APPELLANT'S RENAMED POSITION OF "LOSS PREVENTION MANAGER" DID NOT REPRESENT A PROMOTIONAL JOB CONTENT CHANGE FROM THE SAFETY COORDINATOR POSITION WHICH APPELLANT ASSUMED IN 1987! For Champion to treat her 1994 title change and grade increase as the promotion that it was would be tantamount to admitting that since 1988 Appellant had been unfairly graded and underpaid---a state of affairs which, by 1994, had continued for almost 6 years! Champion was faced with a choice: make it retroactively and prospectively right or

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[35] A grade increase strictly driven by external market data, per Champion's Salary Administration Guidelines, is labelled a "re-evaluation" as distinguished from a "promotion." (R.148: Moty depo., Ex. 40, Pg. 6, JA Pg. 2150, within 2143-2154).

posture in anticipation of litigation. Champion chose the latter. (Champion surely had to appreciate the risk of terminating an 18-year employee with a history of good performance who had just recently complained about gender discrimination). The "solution" was to raise her grade, change her title and call it a market "re-evaluation" instead of a promotion.[36] The evidence shows that this was a contrived, preposterous "determination." An overview makes this apparent. In order to believe Champion's explanations, it is necessary to accept as legitimate and nondiscriminatory one undisputed fact: THAT FROM JUNE, 1987 (when she was promoted to Safety Coordinator) TO JUNE, 1995 (when she left Champion)---A PERIOD OF NEARLY A DECADE!--- APPELLANT, (AN ABOVE AVERAGE- PERFORMER), NEVER RECEIVED ANY PROMOTION OR ANY

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[36]It would be the height of naivety to believe that Champion did not carefully calculate its move under these circumstances. There is certainly a fair inference that the 1994 "determination" was made at the highest level of DairyPak with conscious premeditation. (Mr. Gidez himself was fully aware of Appellant's gender complaints and personally spoke with her about them. R.136: Gidez depo., Pg. 358-359, JA Pg. 1567-1568; R.111: Keyer. depo., Pg. 979-982, JA Pg. 1694-1696). Instead of rectifying the inequity, Champion tried to look good without doing good.

PROMOTIONAL SALARY INCREASE. THIS RECORD ESTABLISHES THAT EXEMPT MALE EMPLOYEES, VIRTUALLY ACROSS-THE-BOARD, (including some with lesser performance records), RECEIVED AT LEAST ONE OR MORE PROMOTIONS AND/OR PROMOTIONAL INCREASES AND/OR EQUITY RAISES OVER ANY 8-YEAR PERIOD, (AND IN MOST CASES IN CONSIDERABLY FEWER YEARS). (R.124: Ex. 17, JA Pg. 746-747 including Exs. 17.1, JA Pg. 748-754 and 17A-17Z, JA Pg. 755-780; R.120: Ex. 72, JA Pg. 1866-1869). Champion cannot explain away this singularly disparate circumstance, peculiar only to Appellant, as the result of claimed legitimate, nondiscriminatory business decisions. The evidence demonstrates that the near decade-long disparate treatment of Appellant resulted from a combination of gender discrimination and retaliation.

VIII. RETALIATION

As previously indicated, the first sign of retaliation began a matter of days after Champion received Appellant's letter objecting to gender discrimination (R.92: Ex. 37, JA Pg. 151-153) and her indication that she was considering legal

action.[37] (R.117: Keyer. depo., Pg. 1448, JA Pg. 1738).

As previously discussed, within two months thereafter, Champion gave Appellant only a non-promotional salary grade increase and a position title change, without a promotional pay raise---a totally unjustified determination, hardly indicative of Champion's good will or fairness.

Once the immediate eruption of retaliatory hostility occurred, there is absolutely no reason to believe (nor evidence to support) that Champion thereafter became genuinely possessed of benign enlightenment and charitable forgiveness; to believe otherwise is contrary to garden-variety common sense. Retaining Appellant (while she continued to actively litigate her lawsuit) had to be something less than

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[37] Appellant testified that immediately after Messrs. Gidez and Stuckey received her letter, they both telephoned Appellant at her office indicating that they would like to talk to her about it, BUT FIRST THEY WISHED TO CONFER WITH MR. MAKOFSKY. The very next morning, Mr. Makofsky, who had just conferred with Stuckey and Gidez, privately met with Appellant in her office and stated to her: "I want you to know that there can be very serious consequences here for you," specifically referring to Appellant's letter. Appellant appropriately took this to be a threat coming from Gidez, the VP, General Manager of the entire DairyPak Division. (R.111: Keyer. depo., Pg. 979 & 981, JA Pg. 1694-1695).

appetizing for Champion.[38] All of the evidence Champion presents attempting to demonstrate its generous, kindly offer to Appellant to transfer her to Stamford can be viewed in one of two ways: either as a sincere, good-faith desire to retain a competent employee, notwithstanding her ongoing adverse lawsuit or the velvet glove covering the iron fist, namely, a carefully orchestrated scenario to get rid of Appellant by insuring that she would not accept the offered transfer, all the while appearing to be acting in well-intentioned and even generous good faith. Champion's claim of sincerity and good faith in this regard is a classic credibility issue for a jury to decide. The evidence certainly shows that Appellant had very sound reason to believe that Champion was not acting in good faith and that the longevity of her tenure was dubious. It

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[38]Before Appellant's gender complaints in March, 1994, it had already been decided that Appellant's position would not be moved from Olmsted Falls to Stamford. (R.118: Keyer. depo., Pg. 2145-2146, JA Pg. 1876-1877; R.136: Gidez depo., Memo from Makofsky to Gidez, Ex. 23, JA Pg. 1600). That decision was reversed after Champion received Appellant's gender complaints in March, 1994. Not long after the submission of her letter, John Stuckey first brought up to Appellant the subject of Champion getting rid of her in connection with her letter. (R.118: Keyer depo., Pg. 2379-2380, JA Pg. 1894-1895 & R.114: Pg. 1344-1345, JA Pg. 1729-1730).

made no sense for her to uproot herself and her family and relocate to Stamford, under these circumstances. This evidence (more fully amplified in our Opening Brief at pg. 39-41), certainly permits a reasonable conclusion that this is precisely the decision Champion intended, manipulated and engineered her to reach.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED JUN 16 1997	) **JUDGE LESLEY**) **BROOKS WELLS**
GERLINDE KEYERLEBER,	)
	) **CASE NO.**
Plaintiff	) **1:94CV2362**
	)
-vs-	) **MEMORANDUM**) **OF OPINION**
CHAMPION INTERNATIONAL CORP., et al.	) **AND ORDER**) **GRANTING**) **DEFENDANT'S**
Defendants	) **MOTION FOR**) **SUMMARY**) **JUDGMENT**

This case is before the Court on the motion for summary judgment filed by defendant, Champion International Corp. ("Champion").

THE COMPLAINT

The complaint in this case was originally filed in the Cuyahoga County, Ohio Court of Common Pleas and was removed to this Court by the defendants on the ground of diversity of citizenship. In her complaint, plaintiff Gerlinde Keyerleber asserts that Champion discriminated against her on the basis of her sex. She claims Champion

provided her with a lower pay, a lower salary grade, lesser benefits, privileges, and rights than were accorded to "similarly situated male peer employees performing services of comparable worth," and that she was excluded "from management participation on an equal basis with similarly situated male employees, including less attention, respect and consideration." She claims these discriminatory actions violate Ohio Rev. Code Ann. § 4112.02(A), and demands compensatory and punitive damages as well as injunctive relief.

FACTUAL BACKGROUND

The evidence discloses the following undisputed facts. Keyerleber was employed by Champion's DairyPak division in Olmsted Falls, Ohio, beginning in 1977. Effective June 1, 1986, she was placed in the position of Production Control Assistant under the immediate supervision of Robert Ray. A year later, on June 1, 1987, Keyerleber was promoted to the position of Safety Coordinator, increasing her salary grade from a grade 10 to a grade 12. Mr. Ray remained Keyerleber's supervisor.

Sixteen months later, on October 1, 1988, plaintiff's position became "Safety Manager." An "Employee Action Form" prepared by Champion and dated January 1989

indicates that this was merely a change in title. However, in her deposition testimony, Keyerleber said she was given significant new job responsibilities which warranted an increase in her salary grade and salary. Keyerleber testified she was told she would be promoted to a higher grade along with a salary increase, but she was not given the higher grade or salary. She did continue to receive regular annual salary increases in her grade.

In 1989, Ray left and Nestor "Andy" Anderson became plaintiff's supervisor for a brief period. Thereafter, Keyerleber's supervisor was Martin "Barry" Makofsky.

Keyerleber told Makofsky that Mr. Ray had promised her a grade and salary increase, and repeatedly asked Makofsky to prepare a new job description for her. Makofsky testified that in response to Keyerleber's requests, shortly after he became her supervisor, he spoke with the compensation department about the matter, but was advised that the change of Keyerleber's position to "Safety Manager" was only a change in title, not a "promotional" change. Keyerleber testified she was not aware that her "promotion" was being treated as a change in title only.

In September 1993, Makofsky was transferred and John A. Stuckey became Keyerleber's immediate

supervisor. In March 1994, Keyerleber sent Stuckey a letter complaining about certain "unfair and discriminating conditions." Among other things, Keyerleber asserted that her salary was lower than the salary of her male peers, and that she was excluded from management meetings. Stuckey discussed this letter with his direct supervisor, Howard Gidez, and they notified Champion's Equal Employment Opportunity officer, Dan Scheiber. Keyerleber met with these parties and with the Vice President of Environmental Affairs, Edward Clem, and the Director of Loss Prevention, Charles Gerber. Effective July 1, 1994, her title was changed to "Loss Prevention Manager," and her salary grade was increased from 12 to 13. However, she did not receive a salary increase except for her usual annual salary increase.

In August 1994, Gidez announced that Keyerleber's position as well as the position of Senior Systems Analyst would be moved from the Olmsted Falls office to Champion's main corporate headquarters in Stamford, Connecticut. At the time, these two positions were the only DairyPak corporate staff positions not located in Stamford. Keyerleber was offered the opportunity to relocate, but after considering the matter for several months, she declined the offer and was terminated from her

employment effective June 9, 1995. Keyerleber testified that a coworker told her she was not wanted in Stamford, and if she relocated there, she would be fired.

LAW AND ANALYSIS

Although her complaint is limited to claims for disparate pay and treatment, Keyerleber also asserts that Champion retaliated against her by transferring her to Stamford, and constructively discharged her from her employment. Champion has responded to these claims. Pursuant to Fed. R. Civ. P. 5(b), these claims will be considered as if they were raised in the pleadings.

Ohio's Fair Employment Practices Act, Ohio Rev. Code Ann. § 4112.02(A), provides that it is an "unlawful discriminatory practice:"

> For any employer, because of the...sex...of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to...terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Ohio courts construing the Fair Employment Practices Act have generally followed federal case law construing Title VII. *See, e.g., Plumbers & **Steamfitters***

Joint Apprenticeship Comm. v. Ohio Civ. Rights Commn., 66 Ohio St.2d 192 (1981). To prove a claim for discriminatory treatment, Keyerleber ultimately must prove that Champion intentionally discriminated against her. ***Department of Community Affairs v. Burdine***, 450 U.S. 248, 253 (1981). She may prove intentional discrimination by either direct or indirect evidence.

A. Disparate Pay

1. Direct Evidence

With respect to her disparate pay claim, Keyerleber argues she can prove intentional discrimination through direct evidence. In support of this claim, Keyerleber points to evidence of the following:

a. On two occasions in 1991, another employee overheard her supervisor, Mr. Makofsky, state that "women had no business in management in a company." Keyerleber herself did not hear Makofsky make this remark.

b. Mr. Makofsky went to "strip bars" on out-of-town trips, and shared stories about these experiences with coworkers, including plaintiff.

c. Keyerleber's previous supervisor, Mr. Anderson, inappropriately greeted female employees, including Keyerleber, with a kiss on the cheek or lips.

d. Anderson also allegedly stated that women did not belong in management. He commented that a meeting went well "because there weren't any women involved."

e. Mr. Ray refused to consider plaintiff for a position as "project engineer" in 1986 because that job "was not for a woman."

None of these statements or events provides direct evidence of discrimination in the determination of Keyerleber's salary or salary grade. "In the context of discrimination cases in this circuit,...direct evidence is evidence which, if believed, 'requires the conclusion that unlawful discrimination was at least a motivating factor'" for a negative employment action. ***Bartlik v. U.S. Dept. of Labor***, 73 F.3d 100, 103 n.5 (6th Cir. 1996). "With direct evidence, the existence of unlawful discrimination is 'patent.'" ***Id.*** Evidence of a generally discriminatory attitude, without any connection between that attitude and

the plaintiff or the negative employment action at issue, is not sufficient to constitute direct evidence of employment discrimination.

Unlike the evidence of discrimination presented by the plaintiffs in ***Talley v. Bravo Pitino Restaurant, Ltd.***, 61 F.3d 1241, 1249 (6th Cir. 1995), ***Miles v. M.N.C. Corp.***, 750 F.2d 867, 875-76 (11th Cir. 1985); and **Lee *v. Russell County Bd. of Educ.***, 684 F.2d 769 (11th Cir. 1982), the evidence here either has no direct connection to the plaintiff or is not connected to the conduct plaintiff claims is discriminatory, that is, the determination of her salary and salary grade when she became safety manager.

> Absent some causal connection or link between an employer's discriminatory statements or conduct and a plaintiff-employee, there is no permissible inference that the employer was motivated by discriminatory animus to act against the plaintiff-employee. The mere fact that an employer may have discriminated against other employees, standing alone, is insufficient.

Byrnes v. LCI Communication Holdings **Co.**, 77 Ohio St.3d 125,130 (1996).

For this reason, the parties' controversy as to whether the decisions about her salary were made by her

supervisors or by the (mostly female) compensation department is immaterial. Even if the Court accepts plaintiff's contention that the decisions were made by her supervisors, who she alleges held discriminatory attitudes and beliefs, absent some connection between a discriminatory statement and the determination of plaintiff's salary, the evidence falls short of direct evidence of discrimination. The simple claim that a supervisor may have held discriminatory attitudes does not show that he applied those attitudes in the determination of plaintiff's salary.

2. Indirect Evidence

Indirect evidence of discrimination may be presented under burden-shifting analysis of ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973). Under the *McDonnell Douglas* analysis, the plaintiff bears the initial burden of establishing a *prima facie* case of discrimination. The *prima facie* case gives rise to an inference of discrimination This inference may be dispelled if the defendant articulates a legitimate, non-discriminatory reason for the adverse employment action. If the defendant articulates a legitimate, non-discriminatory reason, plaintiff must prove the proffered reason was a mere pretext for discrimination.

At all times, the plaintiff bears the burden of proving intentional discrimination.

The ***McDonnell Douglas*** court formulated the elements of a prima facie case of discrimination in a case involving alleged discrimination in hiring or discharge from employment. However, the court made clear that the standard was not inflexible; "the specification...of the prima facie proof required...is not necessarily applicable in every respect to differing factual situations." ***McDonnell Douglas***, 411 U.S. at 802 n. 13. A *prima facie* case of wage discrimination may be made out by proof that plaintiff, a female, received a lower salary than similarly situated males. *Cf.* ***Mitchell v. Toledo Hosp.***, 964 F.2d 577, 582-83 (6th Cir. 1992); ***Sutherland v. Nationwicte Gen. Ins. Co.***, 96 Ohio App.3d 793, 801 (Franklin App. 1994).

Champion argues that plaintiff cannot prove a *prime facie* case of gender discrimination because she cannot show she was treated differently than similarly situated male employees. Champion claims Keyerleber cannot show that the individuals with whom she compares herself are "similarly situated." Furthermore, Champion asserts that no inference of discrimination can be drawn from plaintiff's salary grade because Keyerleber's position is

still assigned to the same salary grade (grade 13), even though the position is now held by a male, Bruce Kummerfeldt.

> In order for two or more employees to be considered similarly-situated for the purpose of creating an inference of disparate treatment in a Title VII case, the plaintiff must prove that all of the relevant aspects of his [or her] employment situation are "nearly identical" to those of the employees who [s]he alleges were treated more favorably. The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances.

Ruth v. Children's Medical Center, 940 F.2d 662 (Table), 1991 WL 151158, at *6 (6th Cir. August 8, 1991) (quoted with approval in ***Pierce v. Commonwealth Life Ins. Co.***, 40 F.3d 796, 802 (6th Cir. 1994)). "[S]imilarity, rather than identity, is the proper inquiry." ***Sutherland v. Nationwide Gen. Ins. Co.***, 96 Ohio App.3d 793, 803 (Franklin App. 1994). Thus, the fact that employees may have worked in different departments under different supervisors does not, in itself, preclude a finding of dissimilar treatment.

Here, plaintiff compares her position to the position

of Plant Manager (salary grades 15 and 16), Production Engineering Manager (salary grade 16), and Graphic Arts Development Manager (salary grade 15). She claims these positions are her "peers," and have the same level of "functional responsibility" as she did. She also compares her position to that of a Loss Prevention Supervisor (salary grade 14) or Environmental Supervisor (salary grade 15) in a paper mill, although she argues her responsibilities for 7 DairyPak plants were greater than the responsibilities allocated to these positions, which were assigned to only one site.

As a matter of law, Plaintiff's assertion that her position should have been salaried at the same level as the Plant Manager, Production Engineering Manager, and Graphic Arts Development Manager must be rejected. These positions do not include job functions sufficiently similar to infer discrimination from the payment of a lower salary to plaintiff. Although these were "peer" positions at the same level of the corporate organization as the plaintiff, the duties of these positions, as set forth in Champion's exempt position description forms,[1] are so different from plaintiffs

[1] Although plaintiff claims that her exempt position description form was inaccurate, she has not pointed to other evidence of her job duties. Plaintiff's position as

that no reasonable juror could conclude the positions were "similarly situated." To the extent plaintiff claims her position was of "comparable worth" to these, the Sixth Circuit Court of Appeals rejected the concept of a comparable worth standard under Title VII in ***International U., U.A.W. v. Michigan***, 886 F.2d 766, 768 (6th Cir. 1989).

The Court further finds the positions of Loss Prevention Supervisor and Environmental Supervisor are not similarly situated to plaintiff's position. These positions entail significantly different responsibilities than

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Safety Manager primarily required her to assist and direct management in each of 6 (later 7) DairyPak facilities "to organize and direct safety programs to insure compliance with OSHA standards," and "direct and assure compliance with all RCRA [Resource Conservation and Recovery Act] activities through local coordinators." The Plant Manager is responsible to supervise daily plant operations, provide leadership, ensure regulatory compliance and proper maintenance of the plant and equipment. The Manager of Graphic Arts Development was charged with assisting in quality control of inbound material, developing procedures to assure all plate-making equipment was maintained properly, staying abreast of new technology, supervising printing improvements, and communicating with foremen to develop training programs regarding press techniques. The Manager of Production Engineering is responsible for researching and gathering information for proposed projects, assigning priorities for projects, and scheduling teams to complete each project.

were assigned to plaintiff. For example, the responsibilities of the Loss Prevention/Environmental Supervisor included the organization and coordination of an "overall loss prevention program for [the] Easter[n] Manufacturing Region." Plaintiff had no loss prevention responsibilities except to "direct monthly statistical reporting to Corporate Loss Prevention." While plaintiff assisted management in each location to organize safety programs and insure compliance with OSHA standards, the Loss Prevention/Environmental Supervisor had the greater responsibility of analyzing OSHA cases, making recommendations for corrective action, and serving as a resource on the law. These duties of these positions are so different from plaintiff's that they cannot be considered "similarly situated."

Plaintiff has failed to demonstrate that she was treated differently than similarly situated male employees, and therefore has failed to prove a prima facie case of discrimination in the determination of her salary. She has also failed to present direct evidence of discrimination. Therefore, her claim that her salary was discriminatory must be denied.

2. Retaliatory Transfer and Constructive Discharge

Keyerleber also claims her position was transferred to Stamford and she was constructively discharged in retaliation for her complaints of discrimination. To prove a *prima facie* case of retaliation, Keyerleber must show (a) she engaged in activity protected by Title VII; (b) plaintiff's exercise of her civil rights was known by the defendant; (c) thereafter, the defendant took an employment action adverse to the plaintiff; and (d) there was a causal connection between the protected activity and the adverse employment action. ***Wrenn v. Gould***, 808 F.2d 493, 500 (6th Cir. 1987).

There is no evidence that the transfer of plaintiff's position to Stamford was "adverse" or was so "objectively intolerable to a reasonable person" that it amounted to a constructive discharge in itself. ***Damell v. Campbell County Fiscal Court***, 731 F.Supp. 1309 (E.D.Ky.1990), *aff'd*, 924 F.2d 1057 (6th Cir.1991) (table). There is no evidence that plaintiff would have suffered any decrease in salary, salary grade, benefits, job duties or responsibilities as a result of the transfer. The change in location to Stamford, where all other supervisory personnel were located, was not a negative action, much less so intolerable that a reasonable person would have felt compelled to resign.

Keyerleber also apparently claims Champion compelled her to decline the transfer by leading her to believe she would be fired if she accepted. In support of her claim that she reasonably believed she would be terminated, plaintiff first points to Makofsky's statement in March 1994 that plaintiff would suffer "serious consequences" as a result of her letter to the defendant complaining of discrimination. This statement was made 5 months before Champion decided to transfer plaintiff's position to Stamford, and is so vague and general that it does not evidence an intention to terminate her employment.

Second, plaintiff asserts that a coworker, Bruce Oberstadt, told her that she was not wanted in Stamford, and "in a month or two or in six months, you're going to find yourself on the street." There is no evidence whether there was a factual basis for Oberstadt's remarks, or whether he was simply offering his opinion or speculation. Therefore, Oberstadt's remarks do not provide a reasonable basis for Keyerleber's belief that she would be terminated.

Another employee, Niru Dave, told Keyerleber that, even before she had made her decision whether to relocate, Howard Gidez (the supervisor of plaintiff's supervisor, John Stuckey) had contacted Dave's supervisor and asked

Dave to "step into the DairyPak safety program because [Keyerleber was] not going to be in Stamford." This kind of third and fourth hand "shop talk" proves nothing.

Finally, plaintiff claims that she expressed her fears of termination in letters, and never received an "assuaging response." Although plaintiff does not point out where in the record these letters might be found, there is evidence that her supervisor, John Stuckey, twice "emphasized" that he was "enthusiastic and hopeful" that Keyerleber would relocate, in letters dated November 11 and December 20, 1994.

Accordingly, the Court finds no evidence that the relocation of plaintiff's position to Stamford was retaliatory or that plaintiff was constructively discharged.

3. Hostile Work Environment.

Finally, plaintiff claims that various gender discriminatory remarks and a "gender biased atmosphere" created a hostile work environment.

> When the workplace is permeated with "discriminatory intimidation, ridicule, and insult,"...that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,"...Title VII

is violated.

> This standard...takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury...Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993).

Keyerleber does not cite the Court to any specific incidents as evidence of a hostile work environment, but instead appears to rely upon the evidence she submitted in support of her disparate pay claim. While a few of these incidents occurred in Keyerleber's presence[1], most

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[1] Plaintiff once heard Makofsky discuss a visit to a "strip bar." She was also greeted with a kiss by Mr. Anderson. Plaintiff conceded the kisses were not sexual or romantic.

occurred outside of her presence. For example, plaintiff did not hear Makofsky state that "women had no place in management," and never saw him with pornographic materials. She did not hear Anderson remark that a female secretary in Stamford was a "big fat chocolate chip cookie," or that women are "only good on their back and they belong either in the kitchen or the bedroom." She never saw Mr. Ray's alleged pornographic computer material. Some of these things were told to Keyerleber by co-workers. Some were not known to her until they were revealed by discovery in this case. To the extent these incidents were not known to Keyerleber, they could not have led her subjectively to perceive her environment as abusive.

The remainder are insufficient as a matter of law to create a hostile work environment.

At best, there may have been occasional, generally discriminatory comments and events, not directed at plaintiff herself, and not sufficiently severe or persistent to create a hostile environment or to be more than merely offensive. *See* ***Black v. Zaring Homes, Inc.***, 104 F.3d 822 (6th Cir. 1997); ***Ringi v. Ameritech Corp.***, 107 F.3d 871

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and she effectively communicated to him that she wanted

(table), 1997 WL 63144 (6th Cir. Feb. 12,1997). Therefore, plaintiff has failed to present evidence of a hostile work environment.

CONCLUSION

For the foregoing reasons, the Court finds there are no genuine issues as to any material fact and Champion is entitled to judgment as a matter of law on plaintiff's claims of discrimination under Ohio Rev. Code Ann. § 4112.02. Therefore, the Court will enter judgment in favor of Champion.

UNITED STATES DISTRICT JUDGE

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him to stop.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GERLINDE KEYERLEBER,	)	**JUDGE LESLEY**
	)	**BROOKS WELLS**
FILED JUN 16, 1997 **Plaintiff**	)	
	)	**CASE NO.**
-vs-	)	**1:94CV2362**
	)	
CHAMPION INTERNATIONAL CORP., et al.	)	**JUDGMENT**
	)	**ENTRY AND**
	)	**AND ORDER OF**
Defendants	)	**DISMISSAL**

This Court, having previously entered its memorandum of opinion and order granting defendant's motion for summary judgment, hereby enters judgment in favor of defendant, Champion International Corporation, and against plaintiff, Gerlinde Keyerleber. Plaintiff's claims against the unnamed "John Doe" defendants are dismissed, without prejudice. Plaintiff shall pay costs.

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UNITED STATES DISTRICT JUDGE

THE CONSTITUTION OF THE UNITED STATES

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(Proposed 1789, Adopted 1791)

CONSTITUTION OF OHIO, 1802

ARTICLE VIII
BILL OF RIGHTS

That the general, great and essential principles of liberty and free government may be recognized and forever unalterably established, we declare,

Section 7 Of redress in courts

That all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered without denial or delay.

Section 8 Trial by jury

That the right of trial by jury shall be inviolate.

4112.01 Definitions

(A) As used in this chapter:

(1) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. "Person" also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesman, appraiser, agent, employee, lending institution, and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state.

(2) "Employer" includes the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer.

(3) "Employee" means an individual employed by any employer but does not include any individual employed in the domestic service of any person.

(4) "Labor organization" includes any organization that exists, in whole or in part, for the purpose of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or other mutual aid or protection in relation to employment.

(5) "Employment agency" includes any person regularly undertaking, with or without compensation, to procure opportunities to work or to procure, recruit, refer, or place employees.

(6) "Commission" means the Ohio civil rights commission created by section 4112.03 of the Revised Code.

(7) "Discriminate" includes segregate or separate.

(8) "Unlawful discriminatory practice" means any act prohibited by section 4112.02, 4112.021, or 4112.022 of the Revised Code.

(9) "Place of public accommodation" means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public.

(10) "Housing accommodations" includes any building or structure, or portion of a building or structure, that is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence, dwelling, dwelling unit, or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or lease.

"Housing accommodations" also includes any housing accommodations held or offered for sale or rent by a real estate broker, salesman, or agent, by any other person pursuant to authorization of the owner, by the owner, or by the owner's legal representative.

(11) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing accommodations because of race, color, religion, sex, familial status, national origin, handicap, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, familial status, national origin, handicap, or ancestry as a condition of affiliation or approval.

(12) "Burial lot" means any lot for the burial of deceased persons within any public burial ground or cemetery, including but not limited to, cemeteries owned and operated by municipal corporations, townships or companies or associations incorporated for cemetery purposes.

(13) "Handicap" means any physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a

physical or mental impairment; or being regarded as having a physical or mental impairment.

(14) Except as otherwise provided in section 4112.021 of the Revised Code, "age" means at least forty years old.

(15) "Familial status" means either of the following:

(a) One or more individuals who are under eighteen years of age and who are domiciled with a parent or guardian having legal custody of the individual or domiciled, with the written permission of the parent or guardian having legal custody, with a designee of the parent or guardian;

(b) Any person who is pregnant or in the process of securing legal custody of any individual who is under eighteen years of age.

(16) (a) Except as provided in division (A) (16) (b) of this section, "physical or mental impairment " includes any of the following:

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito–urinary; hemic and lymphatic; skin; and endocrine;

(ii) Any mental or psychological disorder, including but not limited to, mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(iii) Diseases and conditions, including, but not limited to, orthopedic, visual, speech, and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, human immunodeficiency virus infection, mental retardation, emotional illness, drug addiction, and alcoholism.

(b) "Physical or mental impairment" does not include any of the following:

(i) Homosexuality or bisexuality;

(ii) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(iii) Compulsive gambling, kleptomania, or pyromania;

(iv) Psychoactive substance use disorders resulting from current illegal use of a controlled substance.

(17) "Dwelling unit" means a single unit of a residence for a family of one or more persons.

(18) "Common use areas" means rooms, spaces, or elements inside or outside a building that are made

available for the use of residents of the building or their guests, and includes, but is not limited to, hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas, and passageways among and between buildings.

(19) "Public use areas" means interior or exterior rooms or spaces of a privately or publicly owned building that are made available to the general public.

(20) "Controlled substance" has the same meaning as in section 3719.01 of the Revised Code.

(21) "Handicapped person" means a person with a handicap.

(22) "Handicapped tenant" means a tenant or prospective tenant who is a handicapped person.

(B) For the purpose of divisions (A) to (F) of section 4112.02 of the Revised Code, the terms "because of sex" and "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, child birth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in

their ability or inability to work, and nothing in division (B) of section 4111.17 of the Revised Code shall be interpreted to permit otherwise. This division shall not be construed to require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or except where medical complications have arisen from the abortion, provided that nothing in this division precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.

(1992 H 321, eff. 6-30-92; 1990 H 314; 1979 H 19, H 230; 1976 S 162; 1973 H 610; 1969 H 432, H 47; 131 v S 189; 129 v 1694, 582; 128 v 12)

4112.02 Unlawful Discriminatory Practices

It shall be an unlawful discriminatory practice:

(A) For any employer, because of race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under section 4112.01 to 4112.07 of the Revised Code.

(J) For any person to aid, abet, incite, compel, or coerce the doing of any act declared by this section to be an unlawful discriminatory practice, to obstruct or prevent any person from complying with this chapter or any order issued under it, or to attempt directly or indirectly to commit any act declared by this section to be an unlawful discriminatory practice.

(1996 H 350, eff.1-27-97; 1995 S 2, eff. 7-1-96; 1995 S162, eff.10-29-95; 1992 H 321, § 1, eff. 6-30-92; 1992 H 321, § 3; 1990 H 314, § 1, 3; 1987 H 5; 1980 S 367; 1979 H 230; 1976 S 162; 1975 H 151; 1973 H 610; 1969 H 432, H 47 ; 131 v S 189; 129 v 1694; 128 v 12)

4112.99 Civil Action for Violations

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

(1987 H 5, eff. 9-28-87; 1976 S 162; 1969 H 432; 128 v 12)

Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment,

interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in the evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all

papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall

forthwith order the party employing them to pay to the other party the amount of reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987.)

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

(2)

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No. 99-267

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GERLINDE KEYERLEBER,

Petitioner,

v.

CHAMPION INTERNATIONAL CORPORATION,

Respondent.

On Petition for Writ Of Certiorari to the United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE NATIONAL EMPLOYEE RIGHTS INSTITUTE IN SUPPORT OF THE PETITIONER

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MOTION OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL EMPLOYEE RIGHTS INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, the Association of Trial Lawyers of America, the National Employment Lawyers Association and the National Employee Rights Institute respectfully move this Court for leave to file the accompanying brief as amici curiae in support of the Petition for Writ of Certiorari in this case. Petitioner has granted consent to the filing of this brief. Respondent, through counsel, has denied consent.

The Association of Trial Lawyers of America is a national voluntary bar association whose approximately

50,000 members primarily represent plaintiffs in personal injury suits, tort actions, civil rights cases and employment discrimination actions. Central to ATLA's mission is the preservation of the right to trial by jury.

The National Employment Lawyers Association is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants for employment on claims arising in the workplace.

The National Employee Rights Institute is a non-profit 501(c)(3) organization founded in 1993, with headquarters in Cincinnati, Ohio. NERI helps individuals understand, enforce and expand their rights in the workplace. NERI also provides information, education and assistance to employees and promotes public policies to advance their rights. It is co-publisher of the Employee Rights and Employment Policy Journal and publisher of handbooks aimed at educating employees of their rights. NERI is deeply concerned about the rights of victims of discrimination to jury trial.

The issues in this case are of great concern to ATLA, NELA, NERI, their members, and their clients. An important factor in achieving the goals of the civil rights statutes adopted by Congress and many state legislatures is the judgment of ordinary Americans, speaking as the conscience of the community against discriminatory treatment of workers. The Seventh Amendment guarantees the right to trial by jury in civil cases in federal court. That right rings hollow, however, if the courts of appeals do not vigilantly guard against encroachments by incautious or overzealous judges. Amici believe that this case presents the opportunity for this Court to halt further erosion of Seventh Amendment rights.

Amici believe their brief will assist this Court in its disposition of the Petition for Writ of Certiorari. The Court's decision concerning appellate review of grants of summary

judgment will affect numerous litigants in federal courts. In addition, nearly every state constitution explicitly guarantees the right to trial by jury, and state courts look to this Court for guidance in applying and preserving that right.

ATLA, NELA, NERI and their members have represented, counseled and educated thousands of employees across the country concerning their workplace rights. They believe this broad perspective may aid this Court in addressing the Petition for Certiorari in this case.

For these reasons, the movants respectfully request that the Court grant their motion for leave to file the accompanying brief in this case as amici curiae.

Respectfully submitted,

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September 15, 1999

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BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, and NATIONAL EMPLOYEE RIGHTS INSTITUTE AS AMICI CURIAE IN SUPPORT OF THE PETITION

IDENTITY AND INTEREST OF AMICI CURIAE

Amici respectfully submit this brief to underscore the importance of the issue presented in the Petition: The responsibility of appellate courts to exercise effective review of summary judgments to preserve the right to trial by jury. A motion for leave to file this brief has been filed with the Clerk of this Court.[1]

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[1] Pursuant to Rule 37.6, Amici disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than amici curiae, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

The Association of Trial Lawyers of America is a national voluntary bar association whose approximately 50,000 members primarily represent plaintiffs in personal injury suits, tort actions, civil rights cases and employment discrimination actions. Central to ATLA's mission is the preservation of the right to trial by jury.

The National Employment Lawyers Association is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants for employment on claims arising in the workplace.

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The issues in this case are of great concern to ATLA, NELA, NERI, their members, and their clients. An important factor in achieving the goals of the civil rights statutes adopted by Congress and many state legislatures is the judgment of ordinary Americans, speaking as the conscience of the community against discriminatory treatment of workers. The Seventh Amendment guarantees the right to trial by jury in civil cases in federal court. That right rings hollow, however, if the courts of appeals do not vigilantly guard against encroachments by incautious or overzealous judges. Amici believe that this case presents an opportunity for this Court to halt further erosion of Seventh Amendment rights.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS BELOW FAILED TO EXERCISE DE NOVO REVIEW OF THE SUMMARY JUDGMENT, DEPRIVING PETITIONER OF THE RIGHT TO TRIAL BY JURY GUARANTEED BY THE SEVENTH AMENDMENT.

The Questions Presented by the Petitioner focus on one of the most fundamental duties of the federal courts of appeals in the civil justice system: The constitutional command to preserve the role of the civil jury.

Even among employment discrimination cases, which tend to be fact-intensive, this case is remarkable. In an action involving a single plaintiff, some 15,000 pages of documents were produced in discovery, and 20 witnesses were deposed. In this hotly contested case, the parties' renditions of how Champion International treated Gerline Keyerleber -- and why -- differed in virtually every respect. Petitioner exercised her right to present her case to a jury. *See Taylor v. National Group of Cos., Inc.*, 605 N.E.2d 45 (Ohio 1992)(plaintiff alleging sex discrimination may demand a jury trial); *Hetzel v. Prince William County*, 523 U.S. 208 (1998)(applying Seventh Amendment right to trial by jury in employment discrimination action under Title VII of the Civil Rights Act of 1964). The district court, however, granted Champion's motion for summary judgment.

The courts of appeals, including the Sixth Circuit, have universally held that review of a grant of summary judgment is de novo; the appellate court must apply the same standard that is required of the district court.[2] That standard, this Court

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[2] *See, e.g.*, Catex Vitol Gas, Inc. v. Wolfe, 178 F.3d 572, 577 (1st Cir. 1999); Wilkinson v. Russell, 182 F.3d 89, 96 (2d Cir. 1999); Arnold M. Diamond, Inc. v. Gulf Coast Trading Co., 180 F.3d 518, 521 (3d Cir. 1999); Kubico v. Ogden Logistics Services, 181 F.3d 544, 551 (4th Cir. 1999); Lyons Partnership v. Giannoulas, 179 F.3d 384, 387 (5th Cir. 1999); DePiero v. City of Macedonia, 180 F.3d 770, 776 (6th Cir. 1999);

has cautioned, demands that judges scrupulously avoid trespassing upon the role of the jury:

> Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). *See also Hunt v. Cromartie*, 119 S. Ct. 1545, 1551-52 (1999).

In Petitioner's case, the court of appeals affirmed the grant of summary judgment in a short, unpublished opinion which did not identify the standard of review employed by the court. It is apparent, however, that the court did not examine the evidence de novo to determine whether, viewing the evidence most favorably to the plaintiff, there existed a genuine issue of material fact. Indeed, the court appears to have ignored factual disputes that were plainly presented to it.

Ms. Keyerleber's primary allegation is that when she was promoted from Safety Coordinator to Safety Manager in 1988, she was given no increase in salary grade or salary, unlike male employees promoted into manager positions. The court of appeals stated that "plaintiff has failed to prove that her actual salary was out of line with her responsibilities," that her salary was within the relevant salary range, and that a promotional increase was not required by Champion's own Salary Administration Guidelines. Pet. at A-4 to A-5.

At the outset, Amici are concerned that the court's statements may be interpreted as establishing a novel defense

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American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999); McCaslin v. Wilkins, 183 F.3d 775, 778 (8th Cir. 1999); Interstellar Starship Services, Ltd. v. EPIX, Inc., 1999 WL 515658 at *2 (9th Cir. 1999); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1159 (10th Cir. 1999); American Mfg. Mutual Ins. Co. v. Tison Hog Market, Inc., 182 F.3d 1284, 1287 (11th Cir. 1999); Carpenter v. Federal National Mortgage Ass'n, 174 F.3d 231, 236 (D.C. Cir. 1999).

to a claim of discrimination where a company complies with its own established guidelines. If, for example, a company sets a salary range for a particular level of employee at $30,000 to $50,000, it should be no defense as a matter of law that a female worker was paid $30,000 if male employees earn $50,000. To create such an affirmative defense is beyond the authority of the lower court in this diversity case governed by Ohio law. This Court should grant the Petition to require the court below to clarify the basis of its disposition.[3]

If the language is viewed as simply a factual determination that plaintiff has suffered no discrimination, amici suggest that the court of appeals failed to exercise appropriate de novo review of the evidence. The fact that plaintiff's compensation was within Guidelines is meaningful only if Champion's assignment of Salary Grade 12 to plaintiff was itself not motivated by a discriminatory purpose. On this crucial issue, however, there was sharp dispute. Plaintiff's appellate brief identified a great deal of record evidence calling defendant's motivation into question. Amici suggest that the court's appellate review did not seek to identify disputed issues of fact. Instead, the court appears

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[3] This Court faced an analogous situation in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), a products liability action for wrongful death against the manufacturer of an allegedly defective military helicopter, where the lower court rejected the affirmative "government contractor defense." Justice Scalia stated:

> It is somewhat unclear from the Court of Appeals' opinion, however, whether it was in fact deciding that no reasonable jury could, under the properly formulated defense, have found for the petitioner on the facts presented, or rather was assessing on its own whether the defense had been established. The latter, which is what petitioner asserts occurred, would be error, since whether the facts establish the conditions for the defense is a question for the jury. . . . Although it seems to us doubtful that the Court of Appeals was conducting the factual evaluation that peititoner suggests, we cannot be certain from this language, *and so we remand for clarification of this point.*

487 U.S. at 514 (emphasis added).

to have taken it upon itself to resolve those disputes in favor of the defendant.

A single example serves to illustrate this error. Champion contended that a promotional increase was unwarranted because Ms. Keyerleber's new position was not a promotion, but merely a change in job title. Champion relied heavily on an Employee Action Form prepared by plaintiff's supervisor, which included the notation "change in position title only."

Plaintiff, however, pointed out to the court of appeals, as well as to the district court, evidence from the record which undermined the weight and credibility of this document. Although other EAF's were produced in discovery, the original of plaintiff's could not be found. A copy was produced belatedly and only after a magistrate granted plaintiff's motion for an order to compel. Plaintiff testified on deposition that the entry contradicted representations made by her supervisor. The notation was inconsistent with other parts of the document. Moreover, there was direct testimony by the person who typed the form indicating that she did not type that entry and that it may have been altered or added by someone using a different typewriter. All of these factual disputes were identified for the court with extensive references to the record. Final Brief of Appellant, reproduced in Petition at E-46 to E-52.

This Court has stated that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson, supra,* at 249. A jury in this case would have been entitled to accord little weight or credibility to the EAF, "particularly if disbelief is accompanied by a suspicion of mendacity." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). The court below, however, appears to have resolved this factual dispute in favor of the moving party, Champion.

In the view of Amici, the lower court's affirmance of summary judgment so clearly ignored the record evidence of factual disputes as to deprive petitioner of her constitutional right to trial by jury.

II. FAILURE OF THE COURTS OF APPEALS TO PROTECT THE JURY'S ROLE AS FACTFINDER THREATENS EROSION OF THE SEVENTH AMENDMENT JURY RIGHT.

Americans in 1787 believed that the right to trial by jury in civil cases was so fundmental that they very nearly rejected the newly-proposed Constitution. The Federalists won ratification only by agreeing to add a Bill of Rights that included an explicit guarantee of the jury right. Edith Guild Henderson, *The Background of the Seventh Amendment,* 80 Harv. L. Rev. 289, 295-98 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 667-730 (1973)(extensive review of ratification debates); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History,* 44 Hastings L.J. 579, 599 (1993).

As Justice Story recounts:

> One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress, and which received an assent of the people so general as to establish its importance as a fundamental guaranty of the rights and liberties of the people.

Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830).

Mindful of this history, this Supreme Court has consistently emphasized the responsibility of the courts to guard against any usurpation of the jury's role:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990). Indeed, the right of jury trial in civil cases "should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, 753 (1943).

The Seventh Amendment commands that in suits at common law, the right of trial by jury shall be preserved.[4] Its purpose is preservation of "the common law distinction between the province of the court and that of the jury, whereby . . . issues of law are resolved by the court and issues of fact are to be determined by the jury." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935).

And yet, the modern Rules of Civil Procedure arm the district courts was powerful devices to resolve cases that tread very close to the boundary between the role of judge and jury. One such device is summary judgment under Rule 56, a close relative of the directed verdict. *Anderson*, 477 U.S. at 250.

It is no insult to the district judges of the nation to state that incautious or overzealous judges may on occasion venture across that boundary. In the heat of litigation, the mental agility needed to examine the evidence without adjudging the weight or credibility of documents and witnesses may turn brittle. Confidence that a jury would

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[4] In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend VII.

resolve a factual issue in movant's favor can turn into conviction that no genuine dispute exists at all.

It must therefore be the responsibility of appellate tribunals to police the boundary between the functions of judge and jury with vigilance. Amici believe there is need for this Court to instruct the courts of appeals reviewing summary judgments to "examine the record de novo without relying on the lower courts' understanding," of the evidence. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), to ensure that this powerful device does "not denigrate the role of the jury." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Justice Black, shortly after the Rules became effective, perceived that vigilant review by appellate courts would be critical to protecting the jury right:

> A verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room for honest difference of opinion over the factual issued in controversy. I shall continue to believe, that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right.

Galloway v. United States, 319 U.S. 372, 407 (1943)(Black, J., dissenting). The price of the lack of vigilance may well be "the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 339 (1979)(Rehnquist, J., dissenting), quoting Justice Black in *Galloway*, 319 U.S. at 397.

CONCLUSION

For the forgoing reasons, Amici urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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